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IN THE

Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner in Error,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant in Error.

BRIEF FOR PETITIONER IN ERROR.

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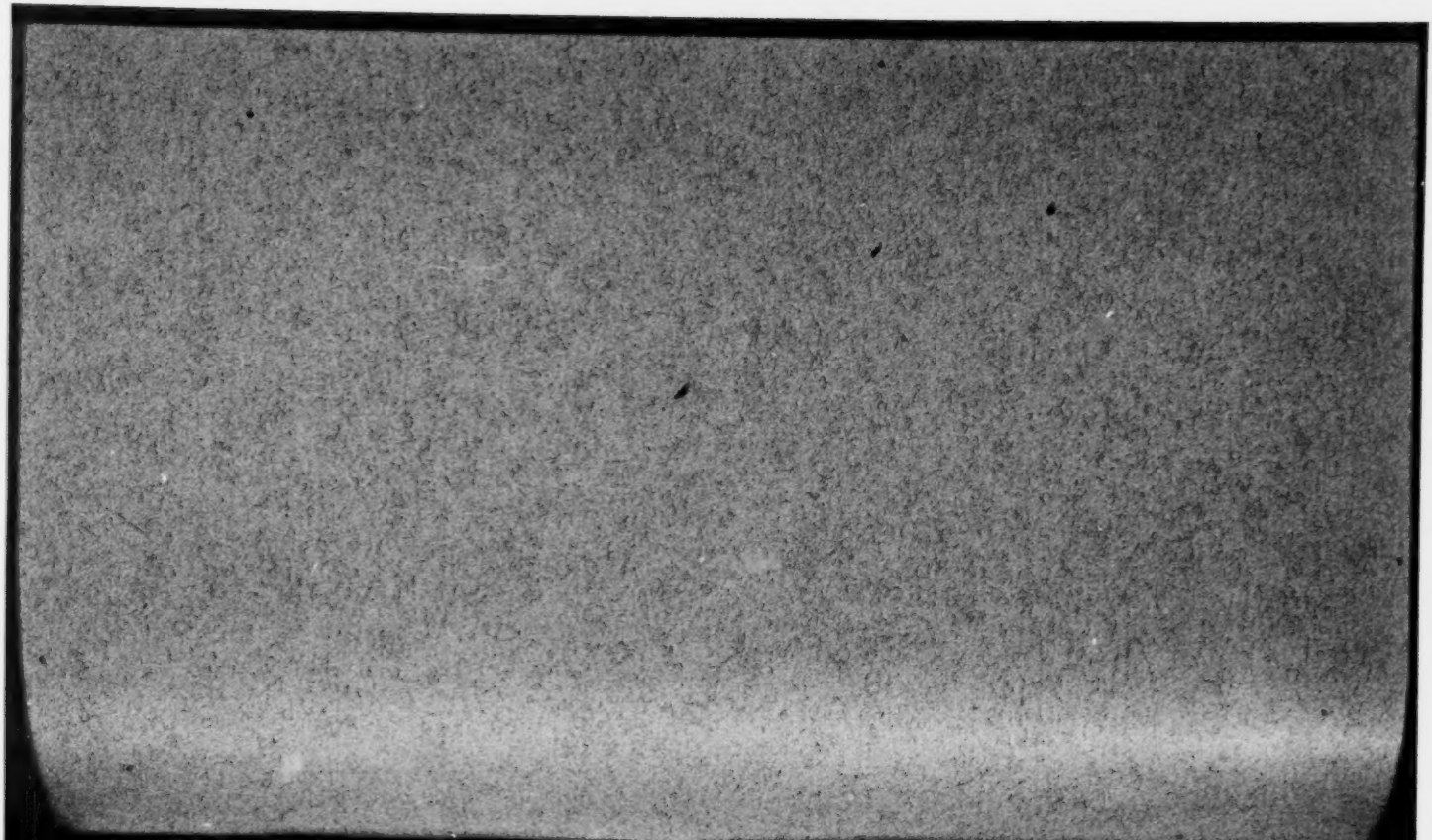

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The Issues.

There are two issues involved in this controversy:

FIRST. Whether, by accepting the burdens, obligations and restrictions of the Act of Congress, July 24, 1866, a telegraph company is thereupon vested with the right to use the right of way of a railroad company, being one of the post-roads of the United States, so long as the use contemplated shall not interfere with the ordinary travel upon such post-road, and upon making just compensation therefor.

SECOND. Whether the Atlantic and Ohio Telegraph Company, a domestic corporation of Pennsylvania, has the right under its charter to

use the right of way of the Pennsylvania Railroad Company, a domestic corporation of Pennsylvania, under the laws of said State; and whether, as lessee and assignee of the property and franchises of the Atlantic and Ohio Telegraph Company, the Western Union Telegraph Company, a corporation of New York, has the right in its own name to exercise the powers and enjoy the franchises of its lessor.

An affirmative answer to the first of these questions would make unnecessary a consideration of the other.

Statement.

At the May Term, 1903, in the Circuit Court of the United States for the Western District of Pennsylvania, a petition was filed by the Western Union Telegraph Company, a corporation of New York, against the Pennsylvania Railroad Company, a corporation of Pennsylvania (see Record, p. 2). The petition prays that the Court issue its process, or take such modes of procedure as might be agreeable to the principles and usages of law, to determine the amount of compensation to be paid by the petitioner, the Western Union Telegraph Company, to the defendant railroad company for the use of the right of way of the defendant and its branches and connecting lines, to construct, maintain and operate a line of telegraph over and along the said railways of the defendant, subject to the conditions and provision named in the Act of Congress, July 24, 1866, and the Acts of Assembly of the Commonwealth of Pennsylvania; and that, upon the payment into court, or to the defendant, as the Court might direct, of the amount of such compensation for the said rights and interests ac-

quired thereby by the said Western Union Telegraph Company, possession may be adjudged to the Western Union Telegraph Company of the said use, rights and interests according to law, and that the title to the said rights and interests, as against the defendant, thereby vest in the Western Union Telegraph Company for the purposes aforesaid. The petitioner at the same time tendered a bond in the sum of $100,000, as security for the payment of whatever compensation might be allowed by the Court, and asked that the bond be approved.

On November 20th, 1902, the petitioner presented in open court its petition, and counsel for the defendant railroad company, appearing specially, objected to the Court's receiving the petition for want of jurisdiction. The Court declined to receive the petition or approve the bond, and fixed November 26th, 1902, for a hearing (Rec., p. 2). On November 26th, 1902, the hearing so fixed was had in open court, counsel for the railroad company appearing specially and denying the Court's power to entertain or act in pursuance of said petition, and the case was thereupon fully argued on both sides (*Idem.*).

On the 20th of January, 1903, the following order was made by the trial judge (Rec., p. 70):

"And now, January 20th, 1903, this case having come on for hearing *sur* petition of the Western Union Telegraph Company for the approval and filing of its bond to the Pennsylvania Railroad Company, and for the issuance of process, and the same having been argued by counsel, after due consideration, it is now ordered that said petition be, and it is hereby, dismissed, at the cost of petitioner.

"By the Court,
"Jos. BUFFINGTON,
"Judge."

Whereupon a writ of error was allowed (Rec., p. 71) and assignments of error filed, the same appearing of record (p. 71).

The facts set forth in the petition may be summarized as follows:

The Western Union Telegraph Company was organized as a telegraph company in the year 1851, and from that time to the present has constructed and operated telegraph lines throughout the United States; that its lines connect with ocean cables leading to Central and South America and foreign countries; that it transmits yearly for the public and for the Government of the United States, exclusive of all railroad messages, messages relating to its own business, and messages transmitted over leased or private wires, upwards of sixty-five million messages; that at the present time its system of telegraph lines under its operation and control comprises over 192,000 miles of poles and cables, and over 900,000 miles of wire, its capital stock being distributed among over 11,000 stockholders; that for many years its lines have been relied upon by the Government of the United States, and the Governments of foreign countries, and the public generally for the quick transmission of intelligence to and from all parts of the United States and foreign countries (Rec., p. 2; Petition, Par. 4).

That the Legislature of the Commonwealth of Pennsylvania, by an act entitled "An Act to incorporate the Atlantic & Ohio Telegraph Company," approved the 24th day of March, 1849, duly incorporated the Atlantic and Ohio Telegraph Company by that name and style, with authority, among other things, to make, use and maintain telegraph lines and communications by one or more routes between the cities of Philadelphia and Pittsburgh, and in-

termediate places, and from Pittsburgh to the Ohio State line. That said act gave to the Atlantic and Ohio Telegraph Company express power to erect and construct works, edifices, fixtures and structures along and across any of the roads, highways, streets and waters within the State of Pennsylvania, the said works so to be placed as not to interfere with the common use of such roads, highways, streets and waters, and the said corporation, and all other persons by them authorized, appointed or employed, should have power and authority to enter into and upon, hold, occupy and enjoy any lands for the purpose of locating and constructing said telegraph lines, and using, maintaining, repairing and enjoying the same, provided that such compensation previous thereto shall be made, secured or tendered to the owner or owners of any land or lands, as shall be agreed upon between the parties, or in such manner as in said act provided. And the act gave, in the event of a failure or inability to agree upon such compensation, the right to said company to have ascertained the amount of compensation or damages to the owner of lands taken and used by said company for telegraph purposes.

By an act of the Assembly of the Commonwealth of Pennsylvania, entitled, "An Act reviving the Charter of the Atlantic & Ohio Telegraph Company, approved twenty-fourth March, one thousand eight hundred and forty-nine," approved February 25, 1869, the charter of said Atlantic & Ohio Telegraph Company was made perpetual. Annexed to the petition as Exhibit 1 are copies of said acts (see Rec., p. 3, Petition, Par. 5; Exhibit 1, Rec., p. 13).

That on the 15th day of April, 1864, the Atlantic and Ohio Telegraph Company entered into a contract of lease with the Western Union Telegraph

Company, whereby the Atlantic and Ohio Telegraph Company leased and demised to the Western Union Telegraph Company for the term of ten years, commencing on the first day of April, 1864, and continuing thereafter until terminated by six months' notice, at the option of either party, all of the telegraph lines, instruments, property, offices and franchises of the said Atlantic and Ohio Telegraph Company for the consideration mentioned in said lease, copy of which is attached to plaintiff's petition as Exhibit 2 (see Rec., p. 3, Petition, Par. 6; Exhibit 2, Rec., p. 18).

That the Legislature of the State of Pennsylvania passed an act, approved May 3, 1871, entitled "An Act supplemental to an Act entitled 'An Act to incorporate the Atlantic and Ohio Telegraph Company, approved March 24, 1849,' and to confirm certain agreements executed by said company," and by said act of May 3, 1871, the lease aforesaid to the Western Union Telegraph Company was ratified, "the same as if the said lease and contract had been made by virtue of express authority of law," and, by the act last mentioned, it was also provided that said Atlantic and Ohio Telegraph Company should have and possess all the rights, powers and privileges conferred by the third and fourth sections of the act of the Legislature of Pennsylvania to incorporate the Eastern Telegraph Company, approved the 5th day of April, 1866. A copy of the act in question is attached to the petition as Exhibit 3 (see Rec., p. 4; Petition, par. 7; Exhibit 3, Rec., p. 19).

That the third and fourth sections of the act incorporating the Eastern Telegraph Company provided, *inter alia*, that said company should have the power to pur-

chase, make, use and maintain any connecting or side lines of telegraph, a copy of which said sections is attached to the petition as Exhibit 4 (see Rec. as above).

The petition further averred that the Congress of the United States passed an act, approved July 24th, 1866, entitled "An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," and the Western Union Telegraph Company on or about the 8th day of June, 1867, duly accepted the provisions of said act by filing with the Postmaster-General of the United States, in writing, an acceptance by said company of all the restrictions and obligations of said act, and that it thereby became entitled to all the privileges and rights granted by the said act to telegraph companies thus accepting the benefits, restrictions and obligations of the same; that it had from the time of its acceptance to the present time complied with all the provisions of said act, and had rendered to the various departments and officers of the Government of the United States all the duties and services required by said act, giving to the Government of the United States priority over all other business and at rates fixed by the Postmaster-General, which rates as thus fixed by him, were very much lower than the reasonable rates charged for similar services rendered to the general public. A copy of petitioner's acceptance of the act in question is attached to the petition as Exhibit 5 (see Rec., pp. 4, 5; Petition, Par. 8; Exhibit 5, Rec., p. 20).

The petition further set forth that Congress, by an act approved June 8th, 1872, had declared all railroads or parts of railroads, which then were or

thereafter might be in operation, to be established post-roads of the United States, and by a further act, approved March 1st, 1884, Congress had declared and established all public roads and highways, while kept up and maintained as such, to be post-roads of the United States (Rec., p. 5; Petition, Par. 9).

The petition further averred that the petitioner had the right to construct, maintain and operate lines of telegraph over and along the railroads of the defendant, being, under the laws of Pennsylvania, highways of that State, and, under the laws of Congress, post-roads of the United States, upon making just compensation for the use of the roadway or right of way of the defendant company and so long as it should not interfere with the ordinary travel on such railroad (Rec., p. 6; Petition, Par. 10).

The petition further sets forth that the Pennsylvania Railroad Company was the owner, and in possession, control and operation as owner, of lines of railroad in the State of Pennsylvania, particularly describing the same (Rec., pp. 6, 7, 8; Petition, Par. 12). And that by the Constitution and the general laws of the State of Pennsylvania, the said several railroads described, belonging to the defendant railroad company, were created and made public highways, and as such, subject to occupation and use by telegraph companies under the provisions of the acts of Congress and the laws of Pennsylvania aforesaid (*idem*).

The petition further sets forth that for many years last past there had been maintained and operated over and along the right of way of the railroads specified, lines of telegraph owned, maintained and operated by the Western Union

Telegraph Company, or its predecessors in title or estate, by and with the consent of the defendant, Pennsylvania Railroad Company, or its predecessors in title, which had been so located, maintained and operated as not to intefere with the ordinary operation and management of the said railways, or the ordinary travel thereon. That the petitioner telegraph company was at that time in possession and control of said telegraph lines; that the same were a part of its system of telegraph, and had been continuously operated by it for the transmission of intelligence for the public and the Government of the United States; and that the same had been maintained and operated by the Western Union Telegraph Company for twenty years last past by and with the consent of the Pennsylvania Railroad Company (Rec., p. 8; Petition, Par. 13).

That on the 15th day of May, 1902, the Pennsylvania Railroad Company had notified the Western Union Telegraph Company to remove its poles and wires, and had withdrawn its consent from plaintiff to occupy its premises longer, and that thereupon the telegraph company applied to the railroad company to have ascertained and determined the amount of compensation to which the railroad company would be entitled for the continued maintenance and operation of the said lines of telegraph under and subject to the terms, conditions and restrictions of the act of Congress aforesaid, and subject to the laws and constitution of the State of Pennsylvania, but that the railroad company refused and declined to treat with the telegraph company, or to agree, or attempt to agree, upon the amount of compensation for the uses aforesaid; but

on the contrary, denied that under the acts of Congress, or the acts of Pennsylvania, or the said lease of the Atlantic and Ohio Telegraph Company, the Western Union Telegraph Company had any right whatever to construct, maintain or operate its telegraph lines over and along said railways.

The petition further avers that the lines of telegraph as presently located, maintained and operated can continue to be so located, maintained and operated without interference with the ordinary travel on the said railroads or the ordinary use, management and operation of said railroads, and that the petitioner would so continue to maintain and operate said telegraph lines as not to intefere with the ordinary travel on said railroads, and subject also to the condition that when in the future the location, maintenance and operation of said lines should be found to interfere with the ordinary travel upon and use of said railways, the petitioner would make such reasonable changes in the location, maintenance and operation of any part of its telegraph lines as that the ordinary travel upon the said railways should be and remain free from interference, as provided in said act of Congress (Rec., pp. 8, 9; Petition, par. 14).

The fifteenth paragraph of the petition avers the necessity for taking the property which the petitioner seeks to appropriate to its use (Rec., p. 9).

The sixteenth paragraph of the petition sets forth the corporate action of the Board of Directors of the petitioner telegraph company under the powers vested by the lease from the Atlantic and Ohio Telegraph Company, the Acts of the Assembly of the Commonwealth of Pennsylvania, ratifying and confirming the same, and of all and every other power enabling it in anywise to do so,

locating a single line of telegraph poles and wires over, along and upon the right of way of the defendant railroad company and its branches, attaching a map to the resolution of the board, and describing in a schedule attached to said map the property sought to be appropriated, the same being made parts of the petition marked "Exhibits 6 and 7." This paragraph further sets forth the efforts made and negotiations had with the railroad company to obtain the privilges required, and its failure to agree with the railroad company for the reasons already stated, and which were embodied in a written communication from the railroad company attached to the petition as Exhibit 8 (see Rec., pp. 9, 10, 11, 12, for Exhibits 6, 7, 8; see Rec., pp. 21).

The opinion of his Honor Judge BUFFINGTON, the trial Judge, on the issues involved is set forth in full (Rec., p. 43, *et seq.*).

Technically, all the facts in this particular case must be looked for in this particular record, but, from the opinion of the Trial Judge, which is given in full, it will appear that at the time of the filing of its petition the Western Union Telegraph Company also filed a bill of complaint on the equity side of the court, seeking to restrain the defendant railroad company from destroying petitioner's property pending the final determination of the issues set forth in the petition not only, but for other, and, as plaintiff believed, weighty reasons set forth in the bill of complaint. This court will also take judicial notice of a controversy between the parties hereto, pending on appeal in this Court from an order granting a temporary injunction made by the Circuit Court of the United States for the District of New Jersey against the

Pennsylvania Railroad Company and the United New Jersey Railroad and Canal Company, enjoining said companies from destroying the property of the Western Union Telegraph Company pending the final disposition of a petition filed in that Court by the Western Union Telegraph Company against the railroad companies, seeking to avail itself of the rights granted it by Congress. It is apparent that the cases are identical in principle, and that the facts, *mutatis mutandis*, are likewise identical. These cases are simply parts of an entire controversy, and the two cases will doubtless be argued together in this Court. We venture to conclude, therefore, that there will be no impropriety if, in the argument of this case, certain facts set forth in the bill filed in the New Jersey case are called to the attention of the Court. The records of the two cases show that the decision of Judge KIRKPATRICK was handed down prior to the decision of Judge BUFFINGTON; while Judge BUFFINGTON refused to allow an injunction, the learned Judge likewise refused, on further consideration, to have an order entered to this effect.

BRIEF OF POINTS.

The Rights of Petitioner under Acts of Congress.

I.

THE WESTERN UNION TELEGRAH COMPANY, PETITIONER, HAVING IN 1867 ACCEPTED THE CONDITIONS IMPOSED BY THE ACT OF CONGRESS, JULY 24, 1866, AND THE VARIOUS ACTS AMENDATORY THEREOF, AND HAVING EVER SINCE FAITHFULLY PERFORMED ALL THE OBLIGATIONS IMPOSED BY THESE ACTS, HAS PAID AND IS PAYING TO THE FEDERAL GOVERNMENT A FULL, ADEQUATE AND CONTINUING CONSIDERATION FOR THE RIGHTS GRANTED BY CONGRESS UNDER THE ACTS AFORESAID, AND HAS THEREBY BECOME NOT ONLY A SPECIAL AND PECULIAR AGENCY OF THE GOVERNMENT, BUT THE GOVERNMENT, UNDER ITS OPTION OF PURCHASE, HAS ACQUIRED A VESTED INTEREST IN THE PROPERTY AND FRANCHISES OF PETITIONER MORE REAL AND TANGIBLE THAN ITS INTEREST OR PROPERTY IN THE PUBLIC MAILS COMMITTED TO ITS CHARGE.

St. at Large. *Vol.* 14, p. 221; copied in R. S., as Sections 5263, *et seq.*

That the Federal Government has a property in the mail see *Scaright v. Stokes*, 3 How., 151.

In re Debs, 158 U. S., 583.

1. Section 4 of the act of Congress, July 24, 1866, provides, "That before any telegraph company shall exercise any of the *powers or privileges conferred*

by this act, such company shall file its written acceptance with the Postmaster-General of the restrictions and obligations required by this act."

2. Section 3 of the act provides, "That the United States may at any time after the expiration of five years from the date of the passage of this act, for postal, military or other purposes, purchase all the telegraph lines, property and effects of any or all of said companies at an appraised value, to be ascertained by five competent disinterested persons, etc."

3. Section 2 of the act provides "That telegraphic communications between the several departments of the Government of the United States, and their officers and agents shall, in their transmission over the lines of any of the said companies, have priority over all other business.

4. "And shall be sent at rates to be annually fixed by the Postmaster-General."

5. Section 3 of the act further provides "That *the rights and privileges hereby granted* **shall not be transferred by any company acting under this act to another corporation, association or person."**

6. By Act of Congress, June 10, 1872, such telegraph companies are required to transmit meteorological observations of military stations and other points, and notice on the northern lakes and seaboard of approaching storms.

7. And by the same Act it was provided that if any telegraph company, having accepted the provisions of the Act of July 24, 1866, its agents or employees "shall hereafter refuse or neglect to transmit any such telegraphic communications as are provided for by the aforesaid act, or by the general resolution approved the 9th day of February, 1870, to authorize the Secretary of War to provide for taking meteorological observations at the military stations and other points of the interior of the continent, and for giving notices on the northern lakes and seaboards of the approach and force of storms, such telegraph company shall forfeit and pay to the United States not less than one hundred dollars and not exceeding one thousand dollars for each such refusal or neglect. To be recovered by an action or actions at law in any District Court of the United States" (see U. S. St. at L., Vol. 17, p. 367).

II.

THE GOVERNMENT OF THE UNITED STATES HAS JURISDICTION OVER EVERY FOOT OF SOIL WITHIN ITS TERRITORY, AND WITHIN ITS ENUMERATED POWERS HAS FULL ATTRIBUTES OF SOVEREIGNTY WITHIN THE LIMITS OF THOSE POWERS, AMONG WHICH ARE THE POWER OVER INTERSTATE COMMERCE AND THE POWER TO ESTABLISH POST-OFFICES AND POST-ROADS.

1. However acrimonious may once have been the debate as to the meaning and limitations of the constitutional provisions above referred to, "it cannot at the present day be doubted that Congress under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies," has power to pass any laws germane to these subjects.

See

Western Un. Tel. Co. vs. James, 162 *U. S.*, 650.

In re Debs, 158 *U. S.*, 564.

Gibbons vs. Ogden, 9 *Wheat.*, 1.

Lake Shore & Mich. Southern R. R. vs. Ohio, 173 *U. S.*, 285.

2. To trace historically the evolution of the doctrine in question:

See 2 Story Const., Chap. 18; 1 Kent's Com. * * * *pages 267 et seq.; and the portions of Elliott's Debates therein referred to; also United*

States vs. Kochersperger, No. 15,541, *Fed. Cases*, Vol. 26, p. 803; *and the various cases growing out of the abandonment of the Cumberland Road, particularly Scaright vs. Stokes*, 3 *How.*, 150 (1845); *Neil vs. Ohio*, 3 *How.*, 720; *Achison vs. Huddleson*, 12 *How.*, 293.

3. The old doctrine that federal sovereignty could only appropriate property within a State with the consent or acquiescence of the State, was forever dissipated by the invincible logic of Judge Cooley in *Trombley vs. Humphry*, 23 *Mich.*, **471, followed by his masterly work on** *Constitutional Limitations*, **both cited with approval by Mr. Justice Strong in** *Kohl vs. United States*, 91 *U. S.*, 367.

III.

WHEN THE HIGHWAYS OF A STATE ARE, BY ACT OF CONGRESS, ESTABLISHED POST-ROADS OF THE UNITED STATES, THEY BECOME PART OF THE POSTAL EQUIPMENT OF THE FEDERAL GOVERNMENT, AND SUBJECT TO THE PARAMOUNT AUTHORITY OF THE FEDERAL GOVERNMENT FOR POSTAL AND MILITARY PURPOSES.

1. In the Constitutional Convention, it was not once suggested by any member, however imbued with the doctrine of State sovereignty, that the Federal Government should not be granted the right to use the highways of a State for postal purposes. The only debate was as to the Feder-

al power to establish Federal post-roads independent of State highways (see 2 Story Const., 1 Kent's Com., above cited with references to Elliott's Debates).

2. Nor has the constitutionality of the Act of July 24, 1866, ever been questioned, except, perhaps, in dissenting opinions. It has uniformly been held that under this act, telegraph companies accepting its provisions have the right to occupy with their lines of telegraph the streets of a city and the roads of a State which by Act of Congress have been established post-roads of the United States.

Postal Tel. & Cable Co. vs. Oregon Short Line R. R. Co., 114 *Fed. Rep.*, 787.
W. U. Tel. Co. vs. Texas, 105 *U. S.*, 460.

"If the Congress of the United States had authority to say that the company might construct and operate its telegraph over these lines (roads?), as we repeatedly have held it had, the State can have no authority to say it shall not be done."

Per MILLER, J., in *Western Union Tel. Co., vs. Massachusetts*, 125 *U. S.*, 554.

[N. B. If the highways, owned and operated by a State, are subject to the paramount authority of Congress for postal and military uses, could anything less be said of a highway, such as a turnpike, for instance, authorized by the State, but operated by a corporate agency created by the State?]

See, also,

West. Un. Tel. Co. vs. City of New York, 38 Fed. Rep., 552.
St. Louis vs. Western Union Tel. Co., 148 U. S., 92.
United States vs. Union Pac. Ry., 160 U. S., 1.
Postal Tel. Co. vs. Oregon Short Line R. R., 65 Pac. Rep., 735.
Hewett, et al., vs. Western Union Tel. Co., 4 Mackey, 424.

IV.

THE PRIMARY USE OF A HIGHWAY IS FOR THE PURPOSE OF TRAVEL, BUT THE OCCUPATION OF THE HIGHWAY BY TELEGRAPH LINES, IF SO MAINTAINED AND OPERATED AS NOT TO INTERFERE WITH THE PRIMARY USE, IS NOT ONLY PERMISSIBLE, BUT, THUS LIMITED, HAS BEEN HELD NOT TO CONSTITUTE AN ADDITIONAL SERVITUDE.

Julia Building Association vs. Bell Tel., 88 *Mo.*, 258.
Same Case, 57 *Amer. Rep.*, 398.
Cater vs. Northwestern Tel. Ex. Co., 60 *Minn.*, 593.
Same Case, 28 *L. R. A.*, 310.
Magee vs. Overshiner, 40 *L. R. A.*, 370.
People vs. Eaton, 100 *Mich.*, 208.
Same case, 24 *L. R. A.*, 721.
Pierce vs. Drew, 136 *Mass.*, 75.
Same Case, 49 *Amer. Rep.*, 7.
Hershfield vs. Rocky Mt. Bell Tel. Co., 2 *Mont.*, 103.

1. According to the reasoning in the foregoing cases, a highway is created not alone for the purpose of travel, but for commerce and the transmission of intelligence.

2. If the millions of messages flashed over the telegraph wires of the petitioner were conveyed by the slower process of carrier or stage coach, it would certainly add to the travel on the highways, and possibly constitute so great a burden as actually to congest and embarrass traffic thereon.

3. Therefore, the telegraph lines fulfill in large measure the primary uses of the highway; relieve the Postal Department of the United States of a great burden and expense; lighten the ordinary travel and traffic on the highway; and thus lessen the cost of its maintenance and repair.

This thought was quaintly put by the Court in *Magee vs. Overshiner (supra)*:

"We observe no means of distinguishing against the telephone equipment, *on the ground that its poles are not in motion as are ordinary instruments of travel.*"

4. And this enormous saving of expense, both to the State and Federal Governments, has the added advantage that the intercommunication of intelligence by telegraph is

accomplishd from minute to minute and with infinitely greater expedition than by carrier or conveyance.

5. Said Cadwalader, J., *U. S. vs. Kochersperger* (C. C. E. D. Penn., 1860), 26 Fed. Cas., 803:

"A post, etymologically defined, is a mode of conveying written or *unwritten* intelligence." According to this the telegraph is a "post."

V.

A RAILROAD IS A HIGHWAY, NOT SIMPLY *sub modo*, BUT INTRINSICALLY AND *per se*, IN THE SAME CATEGORY PRECISELY AS ROADS, STREETS, ALLEYS, TURNPIKES, PLANK ROADS, TRAMWAYS, BRIDGES, FERRIES, CANALS, AND NAVIGABLE RIVERS.

See the vigorous language of Mr. Justice STRONG in *Olcott vs. Supervisors*, 16 Wallace, 678, and the equally vigorous language of Mr. Justice BREWER *In re Debs*, 158 U. S., 564, and Monongahela N. Co. vs. U. S., 148 U. S., 312.

See, also,

Cherokee Nation vs. South. Kan. R. R., 135 U. S., 641-657.

L. S. & M. S. R. R. vs. Ohio, 173 *U. S.*, 285.

Smyth vs. Ames, 169 *U. S.*, 466.

Trunick vs. Smith, 63 Pa. St., 18.

California vs. Pacific R. R. Co., 127 U. S., 1, 39.

W. M. & P. R. R. vs. Jacobson, 179 U. S., 287 (pp. 296, 297).

Railroad Company vs. County of Otoe, 83 U. S., 667 (p. 673).

L. & N. R. R. Co. vs. Kentucky, 161 U. S., 696.

Mich. Tel. Co. vs. City of Charlotte, 93 Fed., 11.

And taxes may be imposed for their construction and maintenance.

Railroad Company vs. County of Otoe, 83 U. S., 667.

Town of Queensbury vs. Culver, 86 U. S., 91.

People vs. Flagg, 46 N. Y., 401.

1. Highways are, of course, differentiated as to the manner of use. It would not be possible, for instance, for the public to use a canal or ferry in the same manner that it uses a turnpike or a bridge. But the primary purpose of every highway is pulic travel, traffic, commerce, communication.

2. But the *manner* of use within the range of physical possibility is for the Legislature to determine.

3. The idea that the right of way of a railroad company is private property, and that as such the railroad company may use, or permit others to use it in such manner as the railroad company itself may elect, is a new idea, growing out of the stupendous material interests controlled by railroad companies, and because the powers thus assumed have fre-

quently been exercised with no more than a protest from the public. As a matter of law, such powers do not exist.

4. It is because railroads are highways that Congress is empowered to establish them as post and military roads of the United States.

5. It is because railroads are highways that State and municipal governments have been permitted to contribute out of the public treasury for their construction and maintenance.

6. It is because railroads are highways that the Congress of the United States has lavished upon many of the railroads of this country subsidies and land grants beyond all precedent in the history of the world.

7. It is because railroads are highways that the people of a community have been taxed to construct and maintain them not only, but that Legislatures have remitted taxes or agreed in some instances that they should be exempt from taxation.

8. It is because railroads are highways that the Supreme Court of the United States has declared the unlawful obstruction of such highways to be a public nuisance.

9. It would be extraordinary if railroad companies could enforce, through the Courts of Justice, public contributions to their maintenance on the ground that they were highways; that they could successfully plead the validity of a statute exempting them from taxation on the ground that they were highways; that they could invoke the power of the Federal Government through its Courts to protect them from the lawless acts of a mob on the ground that they were highways, and as such illegally obstructed—in short, that they were highways for any and every purpose where it would subserve their interests to be such, but that they were only highways sub modo, or so-called, when declared by Congress to be post and military roads of the United States.

VI.

THE POWER OF CONGRESS TO ESTABLISH THE RAILROADS OF THE UNITED STATES AS MILITARY AND POST ROADS IS NOT A DORMANT POWER, BUT HAS BEEN ASSERTED AND ENFORCED BY THE FEDERAL GOVERNMENT FROM THE DAY THE FIRST RAILROAD COMPANY WAS CHARTERED.

1. Congress never passed an act, donating public lands or the proceeds from the sale thereof to the encouragement of railroad enterprise,

that it did not specifically declare that the railroad receiving the benefit of the donation was to be a post and military road of the United States.

2. Congress never chartered the construction of a railroad bridge across a navigable stream that it did not specifically declare such bridge to be a post and military road of the United States.

In numerous instances Congress has not only provided that the bridge, whose construction was authorized, should be a post and military road, but that the United States should have the right of way for postal telegraph purposes across such bridge. See, for example, various bridge acts set forth in Statutes at Large, Vol. 17 pp. 99, 120, 160, 379.

3. By Act of Congress, July 7, 1838, entitled "An Act to establish certain post routes and to discontinue others," it was provided (Sec. 2): **"And be it further enacted that each and every railroad within the limits of the United States, which is or hereafter may be made and completed, shall be a post route, and the Postmaster-General shall cause the mail to be transported thereon, provided he can have it done upon reasonable terms, and not paying therefor in any instance more than 25 per centum over and above what similar transportation would cost in post**

coaches" (U. S. Stat. at Large, Vol. 5, page 283).

4. By Act of Congress, March 3, 1853, entitled, "An Act to establish certain post roads, and for other purposes it was declared as follows (Sec. 3): **"And be it further enacted that all railroads and parts of railroads, which are now and hereafter may be in operation, be, and the same are hereby, declared to be post-roads"** (U. S. Stat. at Large, Vol. 10, page 255).

5. By Act of Congress, January 31, 1862, entitled "An Act to authorize the President of the United States in certain cases to take possession of railroad and telegraph lines, and for other purposes," it was provided (Sec. 1): **"That the President of the United States, when in his judgment the public safety may require it, be, and he is hereby authorized to take possession of any or all the railroad and telegraph lines in the United States, their offices and appurtenances," etc.** (U. S. Stat. at Large, Vol. 12, p. 334).

6. By Act of Congress, June 15th, 1866, entitled "An Act to facilitate commercial, postal and military communication among the several States," it was provided: "Whereas, the Constitution of the United States

confers upon Congress, in express terms, the power to regulate commerce among the several States, to establish post-roads, and to raise and support armies therein, be it enacted by the Senate and House of Representatives of the United States, in Congress assembled, that every railroad in the United States, whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon its roads, boats, bridges and ferries all passengers, troops, government supplies, mails, freight and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States, so as to form continuous lines for the transportation of the same to the place of destination" (U. S. Stat. at Large, Vol. 14, p. 66).

7. By Act of Congress, June 8, 1872, entitled "An Act to revise, consolidate and amend the statutes relating to the Post-Office Department," it was provided as follows: (Sec. 200): **"That all the waters of the United States shall be post-roads during the time the mail is carried thereon, as provided in Section 219.**

"Section 201. That all railways and parts of railways, which are now, or hereafter may be put in operation,

are hereby declared to be post-roads.

"Section 202. That all canals, during the time the mail is carried thereon, are hereby declared to be post-roads.

"Section 203. That all plank roads, during the time the mail is carried thereon, are hereby declared to be post-roads.

"Section 205. That all letter carrier routes, established in any city or town for the collection and delivery of mail matter by carriers, are hereby declared to be post-roads

(U. S. Stat. at Large, Vol. 17, pp. 308, 309).

N. B. In the case of such highways as the waters of the United States, canals and plank roads, Congress, in the foregoing acts, declares them to be post-roads "during the time the mail is carried thereon." Is not the omission of this qualification in the case of railroads somewhat significant?

VII.

BY THE ACT OF JULY 24, 1866, AND CORRELATED ACTS, CONGRESS DECLARED A POLICY AND A PURPOSE, THAT TO ENCOURAGE AND FACILITATE INTERCOMMUNICATION AMONG THE PEOPLE, THE COMPANIES OPERATING THE RAILROADS AND TELEGRAPHS OF THE UNITED STATES SHOULD BE MUTUALLY ACCOMMODATING AND CO-OPERATIVE, AND SHOULD, SO FAR AS PRAC-

TICABLE, CONSTRUCT THEIR LINES OF RAILROAD AND TELEGRAPH ALONG THE SAME RIGHTS-OF-WAY. THIS POLICY IS NOT ONLY MANIFEST FROM THE TITLE AND CONTEXT OF THE ACT OF JULY 24, 1866, BUT FROM THE HISTORY OF THE ACT AND THE DEBATES IN CONGRESS PRIOR TO ITS PASSAGE. THIS POLICY OF THE FEDERAL GOVERNMENT HAS BEEN DISCOVERED AND DECLARED BY THE COURTS, AND NUMEROUS STATES HAVE EXTENDED THE POLICY BY LEGISLATIVE ENACTMENT TO INCLUDE THE TELEPHONE. NOT ONLY SO, BUT THROUGH THE DICTATES OF SELF-INTEREST AND MUTUAL ACCOMMODATION, RAILROAD AND TELEGRAPH COMPANIES, FROM THE EARLIEST TIMES, HAVE UNDER CONTRACT AND AGREEMENT, OPERATED SIDE BY SIDE, SO THAT TO-DAY THERE IS NOT, NOR HAS THERE EVER BEEN, A RAILROAD IN THE UNITED STATES, OVER AND ALONG WHICH TELEGRAPH LINES HAVE NOT BEEN CONSTRUCTED, MAINTAINED AND OPERATED.

1. The title of the act of July 24, 1866, is as follows: "An act to *aid* in the construction of Telegraph Lines, and to *secure* to the Government the use of the same for postal, military and other purposes." The principal, and, indeed, the only valuable "aid" afforded by the act is the grant of a right to go along and over the post and military roads of the United States. If this grant is nugatory—if in affecting to make it Congress transcended its constitutional powers—then there is no aid or encouragement given by the act to telegraph companies of any material consequence, nor any adequate in-

ducement held out to telegraph companies to accept the burdens, restriction and obligations imposed by the act.

2. Under the act, Congress expected to "secure" to the Government the use of these telegraph lines for postal, military and other purposes after they were constructed, by requiring priority of service on behalf of the Government and its officers and by exacting an option for the purchase of the entire telegraphic properties at an appraised valuation. If the lines, when constructed, were liable to destruction at the caprice of a railroad company, and at the termination of a leasehold tenure, however short, the security of telegraphic service, contemplated by the statute, would be more apparent than real.

3. The act had its genesis in the suggestion that the Federal Government construct and own its own telegraph lines. The condition of the country so soon after the War of the Rebellion, as well as a knowledge of the needs of the country begotten by that War, would have amply justified the Government in undertaking the experiment suggested.

4. But while the suggestion of Government ownership eventuated in

the statute as it appears, it was evident from the debates in Congress that the grant of powers to the telegraph companies which might be induced to accept the restrictions, burdens and obligations of the act, were as full and plenary as the Federal Government under the Constitution could bestow.

5. And the statesmanship manifested by the act has been justified by the event, for telegraphic rates to the general public have been reduced ninety per cent., and the use of the telegraph as a means of intercommunication (including private wires, railroad despatches, government messages, etc.), has increased, perhaps, a thousand fold.

6. The public policy created by the act, and as above outlined, has been discovered and declared, not only by the Supreme Court of the United States, but by numerous other tribunals.

See Congressional Globe, Part IV., First Session 39th Congress, pages 3480-3490:

W. U. Tel. Co. vs. Massachusetts, 125 U. S., 530.

United States vs. Union Pac. Ry. Co., 160 U. S., 1, 41, 44, 49.

Tel. Co. vs. Texas, 105 U. S., 460.

Postal Tel.-Cable Co. vs. Oregon Sht. Line, 114 Fed., 787.

Postal Tel.-Cable Co. vs. Southern Ry. Co., 89 Fed., 190.

Postal Tel.-Cable Co. vs. Oregon Sht. Line, 65 Pac. Rep., 735.

West. Un. Tel. Co. vs. B. & S. W. Ry. Co., 3 McCrary, 130.

West. Un. Tel. Co. vs. B. & O. Tel. Co., 19 Fed., 660.

Southern Bell Tel. Co. vs. Richmond, 78 Fed., 858.

7. Not only so, but the statutes of many States extend the right to occupy the highways of the State, including the highways called railroads, to telephone companies—the Supreme Court of the United States having limited the application of the Act of July 24, 1866, to telegraph companies proper.

ALABAMA:

New Orleans, M. & T. R. R. Co. vs. S. & A. T. Co., 53 Ala., 211.

COLORADO:

Union Pac. R. Co. vs. Colo. Postal Tel. Cable Co., 69 Pac., 564.

GEORGIA:

S. F. & W. Ry. Co. vs. Postal Tel. Co., 38 S. E. Rep., 353.

IDAHO:

Postal Tel. Co. vs. O. St. Line Ry. Co., 104 Fed., 623.

ILLINOIS:

St. L. & C. R. R. Co. vs. Postal Tel. Co., 173 Ill., 508.

KENTUCKY:

Postal Tel Co. vs. Mobile & O. R. Co., 54 S. W. Rep., 727.

LOUISIANA:

Postal Tel. Co. vs. M., L. & T. R. R. & S. S. Co., 21 So. Rep., 183.

MISSISSIPPI:

Mobile & O. R. Co. vs. Postal Tel. Co., 26 So. Rep., 370.

NORTH CAROLINA:

Phillips vs. Postal Tel. Co., 41 S. E. Rep., 1022.

TENNESSEE:

Mobile & O. Ry. Co. vs. Postal Tel. Co., 41 L. R. A., 403.

TEXAS:

T. & N. O. Ry. Co. vs. Postal Tel. Co., 52 S. W. Rep., 108.

VIRGINIA:

Postal Tel. Co. vs. Farmville & P. R. Co., 32 S. E. Rep., 468.

UTAH:

Postal Tel. Co. vs. Or. Sht. Line, 65 Pac. Rep., 735.

OHIO:

Rev. St., Sec. 3454, *et seq.*

8. In the case at bar, it is not proposed by the defendant railroad company to relieve its right of way of all telegraph lines, but it is proposed to substitute for the lines of the petitioner the lines of a rival company, the effect being

(whatever the motive) to destroy, as far as may be, one telegraph company and build up and establish, as far as may be, a rival company. It is hardly necessary to observe that Congress did not contemplate reposing such a providential power in any corporation operating one of the post-roads of the United States.

VIII.

BY ACT OF CONGRESS, JULY 24, 1866, THE WESTERN UNION TELEGRAPH COMPANY, HAVING ACCEPTED THE PROVISIONS OF SAID ACT, WAS IN EXPRESS TERMS GRANTED, AMONG OTHER THINGS, "THE RIGHT TO CONSTRUCT, MAINTAIN AND OPERATE LINES OF TELEGRAPH OVER AND ALONG" THE RAILROADS OF THE DEFENDANT RAILROAD COMPANY, PROVIDED ONLY THAT ITS LINES OF TELEGRAPH BE SO CONSTRUCTED AND MAINTAINED AS NOT TO INTERFERE WITH THE ORDINARY TRAVEL ON SUCH RAILROADS.

1. It is true that neither the Western Union Telegraph Company nor the Pennsylvania Railroad Company was specifically named in the grant, the actual language of the grant being as follows:

"That any telegraph company, now organized or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph * * * over and along ary of the military

or post-roads of the United States, which have been or may hereafter be declared such by act of Congress * * * provided that such lines of telegraph shall be so constructed and maintained as not to * * * interfere with the ordinary travel on such military or post-roads."

The substitution of the names of the parties to this suit, both being within the purview of the act, reduces the language of the grant to a concrete expression.

2. Thus read, the act is obviously, and with no room for interpretation, simply the regulation of the use of the right of way of the Penn. R. R. Co. by the sovereign power within the limitations and for the purposes designated in the act, and the only question to determine is whether Congress has transcended its constitutional powers.

3. It should be noted that, while the act in question grants to the Western Union Telegraph Company certain other rights of more or less consequence, the only provisions of the grant invoked by the petitioner, or involved in this case, are in the words above set forth.

IX.

THE RIGHT GRANTED TO THE WESTERN UNION TELEGRAPH COMPANY BY THE ACT OF CONGRESS JULY 24, 1866, IS SIMPLY OF AN EASEMENT OF USE, IN AN EASEMENT, YIELDING AT ALL TIMES TO THE NECESSITIES OF THE PARAMOUNT USE, AND LIMITED AT ALL TIMES TO THE NON-INTERFERENCE WITH THE PRIMARY USES OF THE RAILROAD COMPANY.

1. It will be observed that after the words creating the right here insisted upon, the proviso of the act proceeds to define specifically the actual right created and its limitations.

2. The language of the proviso is, "That such lines of telegraph shall be so constructed *and maintained* **as not to interfere with the ordinary travel," etc. Hence, the original construction of the telegraph lines not only,** *but the subsequent maintenance of those lines,* **must not interfere with the ordinary operations of the railroad upon which they are located.**

3. This proviso can only mean that if, owing to the development and enlargement of travel after the construction of the telegraph lines, the maintenance of such lines shall interfere with the operations of the road, then such lines must be reconstructed or altogether removed, as circumstances may require.

4. It would hardly be possible to create by contract or covenant a better defined obligation on the part of the telegraph company, occupying a railroad right-of-way under the provisions of this act, to remove or transplant its lines of telegraph whenever necessary to accommodate the convenience and requirements of the railroad company.

5. THE PETITIONER IN THIS CASE SEEKS ONLY TO ESTABLISH ITS RIGHT AS THUS LIMITED AND DEFINED.

6. And to show to the Court that such is its understanding of its rights, and to make assurance doubly sure, it proposes in its petition that the judgment finally to be entered shall not only define its rights as above indicated, but shall incorporate its stipulation and agreement to that effect. That such a course is not unusual, see following cases:

St. L. & C. R. R. Co. vs. Postal Tel. Co., 173 Ill., 508-575.

Mobile & O. R. Co. vs. Postal Tel. Co., 41 L. R. A., 403-406.

M. & O. R. Co. vs. Postal Tel. Co., 26 S. Rep., 370-374.

Postal Tel. Co. vs. Or. Sht. Line Co., 65 Pac. R., 735-736.

X.

WHETHER CONGRESS, UNDER ITS CONSTITUTIONAL POWERS OVER THE HIGHWAYS OF THE NATION, AS MILITARY AND POST ROADS, MAY APPROPRIATE THE USE OF SUCH POST ROADS FOR THE CONSTRUCTION AND OPERATION OF POSTAL TELEGRAPH LINES OWNED BY IT, OR BY ONE OF ITS AGENCIES, SO LONG AS THE SAME SHALL NOT INTERFERE WITH THE ORDINARY TRAVEL ON SUCH MILITARY AND POST ROADS, *without making compensation*, EITHER TO THE OWNERS OF THE POST ROADS OR TO THE OWNERS OF REVERSIONARY INTERESTS THEREIN, QUAERE?

Pittsburgh & W. E. Pass. R. vs. Point Bridge Co., 165 Pa. St., 37; s. c., 30 Atlantic Rep., 511.

Stockton vs. B. & N. Y. R. R. Co., 32 Fed., 9.

Scranton vs. Wheeler, 57 *Fed.*, 803; s. c., 179 U. S., 141, and authorities cited.

Hawkins Point Light House Case, 39 Fed., 77; s. c., 155 U. S., 102.

Gibson vs. United States, 166 U. S., 269.

Hewett vs. W. U. Tel. Co. & Dist. Columbia, 4 Mackey, 424.

Monongahela Nav. Co. vs. United States, 148 U. S., 312, the Opinion of Justice BREWER, p. 324.

Hill vs. United States, 149 U. S., 593.

1. The answer to the above query depends upon whether the use made of such military and post-roads, without interference with the primary use of such roads, constitutes a

"taking" within the constitutional inhibition against "taking private property without just compensation."

2. In this connection two facts should be specially noticed:

First. That the property designated in the act is not "private" property, strictly speaking, but public property—a public highway. It is property to construct which the citizen may have been taxed; it is property which, if the Legislature so elect, could be exempt from taxation as public property; it is property condemned to the use of the public and the Government by soveign predominance.

Second. The use contemplated is conditioned upon non-interference with the primary use—to wit.: the ordinary travel on said roads.

Would the use of such property, thus limited, constitute a "taking" within the constitutional inhibition?

3. It is true that a telegraph pole planted in the ground is for the time an exclusive use of the space so occupied, but it is equally true that this use is not necessarily a permanent one. Whether the pole shall be permitted to remain in its original location must depend upon whether its

maintenance there would interfere with ordinary travel as it might be developed on the particular post-road. If it did so interfere, then the telegraph company would be under obligations, by the very terms of its grant, to remove such pole to another location.

XI.

IF A TELEGRAPH COMPANY, ACCEPTING THE OBLIGATIONS OF THE ACT OF CONGRESS, JULY 24, 1866, IN ATTEMPTING TO AVAIL ITSELF OF THE RIGHTS AND PRIVILEGES GRANTED IT BY SAID ACT IN PUBLIC AND QUASI-PUBLIC PROPERTY (TO WIT, THE MILITARY AND POST-ROADS OF THE U. S.), FINDS IT NECESSARY TO APPROPRIATE TO ITS USE PRIVATE PROPERTY INVOLVED WITH THE PUBLIC AND QUASI-PUBLIC PROPERTY, WILL THE GRANT MADE BY CONGRESS BE DECLARED VOID AS TRANSCENDING THE CONSTITUTIONAL POWERS OF CONGRESS, OR WILL THE CONSTITUTION ITSELF BE READ INTO THE ACT AND THE ACT INTERPRETED IN CONNECTION THEREWITH?

1. This question assumes that in availing itself of the rights granted it by the Act of Congress, July 24, 1866, to occupy the postroads of the United States, a telegraph company appropriates to some extent the use of private property incidentally involved with such post-roads, such, for instance, as the reversionary interest of a contiguous owner, or

private property the railroad company itself may have in its right of way.

2. It will be observed that the Act of Congress does not, in terms, require compensation to be made for the use of the property designated; neither is there any machinery provided by the act to ascertain the amount of any compensation to which the owners of private interests affected might be entitled.

3. Is the act, therefore, void as an attempt on the part of Congress to transfer private property from one individual to another private individual, or from one quasi-public corporation to another quasi-public corporation without just compensation being paid therefor? Note well! The act does not declare that compensation shall not be paid.

XII.

RATHER THAN THAT A STATUTE SHOULD FAIL OF ITS PURPOSE OR BE NULLIFIED BY THE COURTS AS UNCONSTITUTIONAL, THE COURTS WILL READ INTO THE STATUTE THE CONSTITUTIONAL INHIBITION AGAINST THE TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION, AND WILL PROVIDE THE COURT MACHINERY NECESSARY TO DETERMINE JUDICIALLY THE AMOUNT OF JUST COMPENSATION TO BE PAID THEREFOR.

1. The Courts will do this for the following reasons:

First. "If the implication in favor of the intended exercise of the power is very strong —*for example, that the grant itself would be defeated if the company were not allowed to condemn* —the right to condemn may be exercised on the theory that an implied right has been granted" (Amer. & Eng. Enc. of Law, Vol. 10, p. 1054; quoted with approval by his Honor Judge BUFFINGTON; see Opinion, Record, p.).

Second. "It is a cardinal rule that all statutes are to be so construed as to sustain, rather than ignore or defeat them; to give them operation, if the language will permit, instead of treating them as meaningless; *ut res magis valeat, quam pereat.* Whenever an act can be so construed and applied as to avoid conflict with the constitution, and give it the force of law, this will be done" (Sutherland on Statutory Construction, Section 332).

Third. "When the use is granted, everything is granted by which the grantee may have and enjoy the use;" or, as stated in "Broom's Maxims": "*Les est cuicunque, aliquis, quod concedit, concedere videtur et id sine quo res ipsa non potuit*" (quoted by Justice BALDWIN in *Charles River Bridge vs. Warren Bridge*, 11 Pet., 420-630).

Fourth. "Whenever anything is authorized to be done by law, and it is found impossible to do that thing unless something else not authorized in express terms be also done, then that something else will be supplied by necessary intendment" (*Fenton vs. Hampdon*, 11 Moore's P. C., 360).

See also *Sutherland's Statutory Construction*, §§295, 324, 332, 340, 341, 343, 344, 379, 382, 388.

Fifth. The constitutional inhibition against taking private property without just compensation, being negative, is self-executing, and is to be read into every law and statute where applicable.

In re Rughcimer, 36 Fed., 369.
Hickman vs. City of Kansas, 41 Am. St. Rep., 684, and note.
West Un. Tel. Co. vs. Williams, 8 L. R. A., 429.
Compare *Neal vs. Delaware*, 103 *U. S.*, 370; *East St. Louis vs. Amy*, 120 *id.* 600.
Kentucky Railroad Tax Cases, 115 *U. S.*, 321, 334.

Sixth. Where a right is given by law or statute, and no special machinery is provided for the enforcement of the law, the Courts will supply the machinery, either by adopting the machinery already in use or the machinery in vogue at common law, which, in cases of condemnation, was the writ ad quod damnum. The writ of ad quod damnum simply means that the amount of compensation to be paid to an owner for the appropriation of his private property to a public use shall be determined by a full jury.

Kohl vs. United States, 91 U. S., 367.
Unites States vs. Jones 109 U. S., 513.
High Bridge Co. vs. United States, 69 Fed., 320.

Dashiell vs. Grosvenor, 66 *Id.,* 338.
City of New York vs. Pine, 185 U. S., 93.
Osborne vs. Mo. Pac. Ry. Co., 147 U. S., 248.
McElroy vs. Kansas City, 21 Fed. Rep., 357.
United States vs. Great Falls Mfg. Co., 112 U. S., 645.

As to the writ *ad quod damnum,* see:

2 Lewis Em. Dom., Sec. 402.
Scudder vs. T. D. F. Co., 1 Sax. Ch. (N. J.), 694.
Hooker vs. New Haven & N. Co., 14 Conn., 146.
Jerome vs. Ross, 7 Johns. Ch., 315.
Wheelock vs. Young, 4 Wend., 650.
Stevens vs. The Proprs. of Middlesex County, 12 Mass., 466.
Bloodgood vs. M. & H. R. R. Co., 18 *Wend.,* 9.
Beekman vs. S. & S. R. R. Co., 3 *Paige Ch.,* 45.

NOTE: In *Upshur County vs. Rich,* 135 U. S., 467-476, commenting on the case of *Kohl vs. United States, supra,* it was said that the mode of procedure in this case was analogous to the proceeding of *ad quod damnum* at common law.

XIII.

THE ACT OF JULY 24, 1866, NECESSARILY IMPLIES THAT THE BENEFICIARY, UNDER THE ACT, IS VESTED WITH THE POWER OF EMINENT DOMAIN IF, TO AVAIL ITSELF OF THE RIGHTS GRANTED, PRIVATE PROPERTY, INCIDENTALLY INVOLVED WITH THE SPECIFIC PROPERTY APPROPRIATED TO ITS USE, IS ALSO APPROPRIATED BY IT; OTHERWISE THE GRANT WOULD FAIL.

1. The right of eminent domain is implied whenever the grant itself would be defeated if the company was not allowed to condemn. This proposition is conceded by the trial Judge (see Opinion, Record, p.).

2. The legislative grant to a corporation of the right to *own and hold* land would not, of course, imply a right to condemn, for the grant would simply create a *capacity* in the corporation to own and hold land, *however acquired.* Hence, the case of *Murphy vs. Kingston, etc., R. R.*, 11 Ontario Rep., 582, cited by the trial judge, is not in point.

3. The right of a corporation vested with the *general* power of eminent domain, to appropriate to its use the property of a corporation *already dedicated to a public use*, is not ordinarily permitted *unless the existence of certain physical facts makes such appropriation necessary in order that the subsequent grant shall stand. In such case it is not the power but the exemption that is implied.* This principle has no relevancy to the present controversy, and the cases cited by the trial Court, in illustration of the principle, are therefore not in point.

4. The Act of July 24, 1866, does not purport to create in the telegraph company accepting its terms a mere capacity to own and hold lands; nor does the implication of a right of eminent domain arise out of physical and extrinsic facts.

5. THE IMPLICATION OF THE RIGHT OF EMINENT DOMAIN ARISES OUT OF THE VERY LANGUAGE OF THE GRANT, AND SUCH POWER MUST BE IMPLIED TO GIVE EFFECT TO THE GRANT, OR THE GRANT ITSELF MUST FAIL.

6. Congress, by the act in question, affects to create in the petitioner a right of user in the defendant's railroad, but says nothing about compensation. Except for the constitutional inhibition against taking property without just compensation, the petitioner could enter upon the enjoyment of the use without the tender or payment of any consideration; and if the right created by the Act of Congress shall not be deemed a "taking" within the meaning of the Constitution, the petitioner, notwithstanding the Fifth Amendment, would have the right to enter.

7. IT IS THE CONSTITUTION ALONE THAT WOULD BAR PETITIONER FROM THE USE AUTHORIZED, AND THE QUESTION, THEREFORE, REPEATS ITSELF: IS THE ACT, AUTHORIZING THE USE, TO FAIL? OR IS IT TO BE READ IN CONNECTION WITH, AND IN SUBORDINATION TO, THE CONSTITUTION, AND THE RIGHTS CREATED BY IT ENFORCED UPON THE PAYMENT OF A JUST COMPENSATION?

XIV.

NO CASE INVOLVING THE PRINCIPAL ISSUE HERE IN CONTROVERSY HAS EVER BEEN PRESENTED TO THE SUPREME COURT OF THE UNITED STATES FOR ADJUDICATION. THE LANGUAGE OF CHIEF-JUSTICE WAITE IN THE PENSACOLA CASE, REITERATED BY CHIEF-JUSTICE FULLER IN THE ANN ARBOR CASE, ASSUMED BY COUNSEL FOR DEFENDANT AND BY THE TRIAL COURT AS CONCLUDING THE PETITIONER ON THE PRINCIPAL POINT HERE INVOLVED, IS NOT ONLY CLEARLY OBITER, BUT BY NO MEANS JUSTIFIES THE SIGNIFICANCE ATTRIBUTED TO IT.

1. Whether a telegraph company that had accepted the conditions of the Act of Congress, July 24, 1866, could appropriate private property, was not in issue in either the *Pensacola Case* (96 U. S., 1), or the *Ann Arbor Case* (178 U. S., 239), and all that is said therein, as to the scope of the act beyond the points directly in issue, is clearly *obiter*.

2. If the meaning of such obiter dicta is as contended for by counsel for the defendant, and the Trial Court, then it is inconsistent with other statements made by the very Justices rendering these opinions, and diametrically opposed to the ruling of the Supreme Court of the United States in other cases.

3. If properly apprehended and fairly construed, the *dicta* in these two cases do not admit the construction placed upon them by counsel for defendant and the Trial Court.

XV.

WHILE THE PRINCIPAL ISSUE IN THIS CASE HAS NEVER BEEN PRESENTED TO THE SUPERME COURT OF THE UNITED STATES, LESSER COURTS HAVE SEVERAL TIMES PASSED UPON IT, AND, WITH ONE EXCEPTION, HAVE CONSTRUED THE ACT OF CONGRESS, JULY 24, 1866, ACCORDING TO THE PRINCIPLES CONTENDED FOR BY THE PETITIONER IN ERROR.

Postal Tel.-Cable Co. vs. Oregon Short Line, 114 *Fed.*, 787.

Postal Tel.-Cable Co. vs. Southern R. R. Co., 89 Fed. Rep., 190.

Postal Tel.-Cable Co. vs. Oregon Short Line, 65 Pac. Rep., 735.

St. P., M. & M. R. R. Co. vs. W. U. Tel. Co. (C. C. A.), 118 Fed., 497.

Cf. St. Louis vs. W. U. Tel. Co., 148 U. S., 92.

United States vs. Union Pac. Ry. Co., 160 U. S., 1-41.

Southern Bell Telephone Co. vs. Richmond, 78 Fed., 858.

Union Trust Co. vs. A., T. & S. F. R. R. Co. (New Mexico), 43 Pac. Rep., 701.

Mercantile Trust Co. vs. Atlantic & Pac. R. R. Co., 63 Fed., 513.

W. U. Tel. Co. vs. Los Angeles Electric Co., 76 Fed., 178.

Contra, Postal Telegraph-Cable Co. vs. C., C., C. & St. L. R. R. Co., 94 Fed. Rep., 234.

PETITIONER'S RIGHTS AS LESSEE OF THE PROPERTY AND FRANCHISES OF THE ATLANTIC AND OHIO TELEGRAPH COMPANY.

I.

THE ATLANTIC AND OHIO TELEGRAPH COMPANY WAS AUTHORIZED BY ITS CHARTER TO APPROPRIATE TO ITS USE, WITHIN SPECIFIED LIMITATIONS, PROPERTY OF A SPECIFIC CHARACTER, TO WIT, THE ROADS, HIGHWAYS, STREETS AND WATERS OF THE STATE OF PENNSYLVANIA. DEFENDANT'S RAILROAD IS NOT ONLY A HIGHWAY OF THE STATE IN ITS VERY NATURE, BUT BY ITS CHARTER AND THE CONSTITUTION OF PENNSYLVANIA IS EXPRESSLY DECLARED TO BE A HIGHWAY. HENCE, IT IS SUBJECT TO THE APPROPRIATION OF THE ATLANTIC AND OHIO TELEGRAPH COMPANY, WITHIN THE LIMITATIONS OF THE RIGHT GRANTED.

1. The charter of the Atlantic and Ohio Telegraph Company (Section 5) gave the right to that company to erect and construct works, edifices, fixtures and structures along and across any of the roads, highways, streets and waters within the State of Pennsylvania, the said works to be so placed as *not to interfere with the common use* of such roads, highways, streets and waters. And the said corporation, *and all other persons by them authorized*, appointed or employed were given the power and authority to enter into and upon, hold, occupy and enjoy any land for the purpose of locating and constructing its telegraph lines, and using, repairing, maintaining and enjoying the same, * * * provided that compensation previous thereto shall be made, secured and

tendered to the owner or owners of any land, as shall be agreed upon between the parties or in such manner as in the act mentioned (Record, pp. 22, 23; Exhibit 1).

2. Section 1, Article 17, of the Constitution of Pennsylvania provides:

"*All railroads and canals shall be public highways.*"

3. Section 12, Article 16, of the Constitution of Pennsylvania provides:

"Any association or corporation, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph within this State, and to connect the same with other lines, and the General Assembly shall by general law of uniform operation provide reasonable regulations to give full effect to this section."

4. Section 3, Article 16, of the Constitution of Pennsylvania provides:

"The exercise of the right of eminent domain shall never be abridged or so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as the property of individuals."

5. Clause 1, Section 33, Chapter 6, of the Act of the Pennsylvania Legislature of April 29th, 1874, provides:

"Such corporation (telegraph) *shall be authorized*, when incorporated as hereinbefore provided, *to construct lines of telegraph along and upon any of the public roads, streets, lands or highways*, or across any of the waters within the limits of this State, by the erection of the necessary fixtures,"

etc., * * * "but the same shall *not be so constructed as to incommode the public use* of said roads, streets, or highways."

Clause 2 of the foregoing act provides:

"In all cases where the parties cannot agree upon the amount of damages claimed, or, by reason of the absence of legal capacity of the owner or owners, no such agreement can be made for the right to enter upon lands or premises for the purpose named in this section, the company shall tender a bond, or have the same filed in the manner provided in the forty-first section of this act, and proceedings shall be had as therein set forth."

6. In the case of People's T. & T. Co. vs. Burkes & D. T. Road, 199 Pa. St., 411; s. c., 49 Atl. Rep., 284, it was held that, because a turnpike was a highway in its very nature, and because a telephone or telegraph company had a right to occupy the highways of the State, therefore, the telephone or telegraph company could appropriate to its use the turnpike highway, within the limitations aforesaid. See, also, P. & W. E. P. Ry. Co. vs. Point Bridge Co., 165 Pa. S., 37; s. c., 30 Atl. R., 511.

It will be observed that neither Section 1, Article 17, of the Constitution of Pennsylvania, nor any other section nor article of that instrument, specifically declares a turnpike or a bridge to be a highway. *The Constitution does declare, however, that railroads shall be public highways.* If, therefore, a turnpike can be sub-

jected to the use of a telephone or telegraph company, *because it is a highway in its very nature, a fortiori, is a railroad subject to such use to the extent provided in the Act of Congress of July 24, 1866, being not only a highway per se, but expressly declared such by the Consitution of the State. Morever, the defendant's railroad is a highway by the very terms of its charter.*

Trunick vs. Smith, 63 Pa. S., 18.

II.

AS LESSEE OF THE FRANCHISES OF THE ATLANTIC AND OHIO TELEGRAPH COMPANY, THE WESTERN UNION TELEGRAPH COMPANY HAS THE RIGHT IN ITS OWN NAME TO EXERCISE SUCH FRANCHISES, INCLUDING THE FRANCHISE OF EMINENT DOMAIN.

1. This was practically conceded by the trial judge, who held, however, that the Atlantic and Ohio Telegraph Company was not authorized under its charter to appropriate to its use a railroad right of way, even within the limitations imposed—to wit, that the use should not interfere with the common use of such highway, or incommode the public use thereof.

2. Not only would the Western Union Telegraph Company have the right to condemn in its own name, under the express terms of the Atlantic and Ohio charter already quoted, but it would have the right under the general principles and policy of law, which justifies the condemnation only upon the theory that *the property when condemned is for the use of the public, by whomsoever condemned*, and that "the *delectus per-*

sonarum is of little more than theoretical importance, and is the least determining element in the more common cases where the power is conferred" (per HOLMES, J., in *Abbott vs. New York and New England R. R. Co.* [Mass.], 15 N. E. Rep., 91).

See, also,

California Central Railway Co. vs. Hooper, et al., 76 *Cal.*, 404.

Crolley vs. Minneapolis & St. Louis R. R. Co., 30 Minn., 541.

C. & W. I. R. R. Co. vs. I. C. R. R. Co., 113 Ill., 156.

Kip vs. N. Y. & Harlem R. R. Co., 6 Hun, 24; s. c., 67 N. Y., 227.

Argument.

The Act of Congress, July 24th, 1866, *offers inducements to the telegraph company*, created by any State of the Union, to accept the burdens, restrictions and obligations imposed by the act. *It was meant to be a distinct temptation*, and it was hoped by the Government that every telegraph company with ambitious designs would yield to it.

The burdens and obligations imposed by this act, and subsequent acts, are not merely nominal. *They constitute the consideration moving to the Government for the rights granted by the act.* They require, in the first place, that the entire machinery of the telegraph company shall be devoted primarily to the Government service in all its departments, and to whatever extent the Government and its officials may require. One of the statutes denounces penalties against any telegraph company

which may neglect or refuse to perform such service. Moreover, the Government becomes the potential owner of all the property and effects of every telegraph company accepting the provisions of the act, by exacting an option for the purchase of such telegraph property and effects at an appraised valuation. And the service to be performed for the Government is at a price arbitrarily fixed by the Postmaster-General, which price, we take it, may be anything this side of confiscation.

The petitioner in this case avers, under oath, that the Western Union Telegraph Company, as early as 1867, accepted the burdens and obligations imposed by the act, and has ever since performed, and is now performing for the Government, all the services required by the act. It is here asking, in effect, that the Government, on its part, shall perform its contract, and make good its promises.

If the United States has an actual property interest in the *mail matter*, entrusted to it simply for delivery (see Debs Case, 158 U. S., 564), will it be contended that it has no property interest in the telegraph lines of the petitioner company, the services of which are at its primary disposal, and from which it holds, and has held since 1867, an optional contract of purchase?

But whatever occasion may hereafter arise for the Government itself to protect the telegraphic property at stake, *we assert, as our first proposition, that the Western Union Telegraph Company is entitled to insist that the rights granted it by the Federal Government shall be enforced to the full extent that the Congress of the United States had power to make them.*

What, then, were the rights and privileges granted the Western Union Telegraph Company by the Congress of the United States?

There is only one right of particular value, or that would constitute a distinct inducement, much less temptation, to any telegraph company to accept the provisions of the act. This will more fully appear if we catalogue the rights granted by the act.

The act says (Section 1, St. at L., Vol. 14, p. 221):

"Any telegraph company, now organized or which may hereafter be organized under the laws of any State in this Union shall have the right

1. "To construct, maintain and operate lines of telegraph through and over *any portion of the public domain of the United States.*

2. *"Over and along any of the military or post-roads of the United States which have been or may hereafter be declared such by act of Congress.*

3. "And over, under or across the navigable *streams or waters of the United States."*

But the rights above granted are expressly limited by the *proviso*, which declares that such lines of telegraph shall be so constructed and maintained "as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military and post-roads."

4. As a sort of addendum to the foregoing grants, and as a secondary inducement, the act further provides:

"And any of such companies shall have the right to take and use from such public lands, the necessary stone, timber and other material for its posts, piers, stations, and other needful uses, and—

5. "May pre-empt and use such portion of the unoccupied public lands subject to pre-emption, through which its said lines of telegraph may be

located, as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other."

These are all the rights granted by the Act. And yet it is sought to limit the rights granted altogether to the use of the public domain—*meaning the unappropriated lands of the United States*—and to any post-roads that may be established over such public domain, or built and owned by the Federal Government for its exclusive use. Thus amended, the act would purport to grant, *not* a right to build telegraph lines over and along *all* the military and post-roads of the United States, WHICH CONGRESS MIGHT AT ANY TIME DECLARE TO BE SUCH, but the right only to construct telegraph lines over and along such military and post-roads *as the Government might own in its own right*, and for its exclusive use, unembarrassed by State authority or the right of user by the public generally. In other words, the right granted would be simply a right of way over the public domain—a snake track in the desert. It is enough to say that a right, thus limited, would offer no inducement whatever to a telegraph company to accept the burdens, obligations and restrictions which accompany it.

The telegraph company, accepting the provisions of the act would not be expected so to interpret its rights. *The company would have the right to rely upon the plain and perfectly comprehensible language of the act;* it would be a fraud on a telegraph company, accepting the offer of Congress *and relying upon the unambiguous language of that offer*, if the rights which it believed it was acquiring, *and which were within the constitutional powers of*

Congress to give, were whittled away and minimized by artificial construction.

If Congress had no constitutional power to make the grant to the full extent plainly indicated by its own language, and it became necessary, in order to maintain the validity of the act *and save it from annihilation*, to inject into it some meaning within the constitutional limitations of Congress, then we admit it would be the duty of the courts so to construe the act as to preserve, if possible, its constitutionality, and to give effect to it within constitutional limitations. AND THE SOLE ISSUE, ON THIS BRANCH OF THE CASE, CONCERNS THE CONSTITUTIONALITY OF THE ACT OF CONGRESS, JULY 24TH, 1866.

Before taking up this principal subject for argument, let us consider somewhat more fully *the nature and value of the rights granted by Congress.*

In the year 1866, the "public domain" of the United States, subject to pre-emption, was for the most part an unsegregated body of land between the Missouri River and the Pacific Coast. There can be no doubt that just as Congress had offered extraordinary inducements to private enterprise to build railroads across the continent in order that the distant Western States and Territories might be more closely united with the thickly populated States of the East, so the Act of 1866 was passed to encourage private enterprise to construct telegraph lines in all parts of the United States, affording instantaneous means of communication among the people of the whole country, thereby fostering a unity of sentiment that comes only from a unity of interest and sympathy. The War of the Rebellion had cost the people of the United States thousands and thousands of lives, and millions upon millions of treasure, to cure themselves of the illusion that

the Constitution of the United States was simply a covenant of federation among sovereign States, and not the creation of a sovereign nation. During the four years of war and the period of reconstruction, Congress had been obliged, perhaps, to stretch its constitutional powers to the utmost. *It had formed the habit of dealing with large questions largely.* In its estimation, and in the estimation of the whole country, there was no question so large and so pre-eminent as the question of national unity. This meant the homogeneity of the American people, and such homogeneity was possible only through mutual acquaintance, mutual affection, mutual interest and mutual dealings; *and all these were possible only through intercommunication.*

But why quote to this tribunal history so familiar? Simply that your Honors may recall the public and governmental needs of those times, and discern therein the purpose of Congress to supply those needs.

Considering then the physical, financial and political condition of the country in the year 1866, can it be thought for a moment that the grant of a right of way for the construction of a telegraph line across the "public domain" of the United States would be any inducement whatever to private enterprise to build such lines? From what source would the telegraph company obtain its patronage? What people were there on the public domain whose business interests required the use of the telegraph? As an *incidental* right, circumstances might arise which would make the grant of some value; but, as an inducement in and of itself, it had no value whatever.

And the same may be said of the right granted by Congress to take and use from the public do-

main the necessary stone, timber and other material for posts, piers, stations, etc. So far as any inducement to private enterprise, Congress might as well have granted the right to pick up pebbles on the seashore.

And what particular inducement was there in the grant of the right to pre-empt forty acres of preemptible land, provided so much should be needed for a station? For it will be observed that the grant was not of forty acres, but simply so much of forty acres as might be needed for a station. The grant of forty acres of land, the market value of which was not to exceed one or two dollars per acre, could hardly be called a glittering temptation to embark in the business of building telegraph lines "through the public domain."

The right to cross navigable streams and waters of the United States was, perhaps, a valuable right in the abstract, but had no particular practical value disassociated from the grant of right which immediately precedes it—to wit.: the right to construct, maintain and operate lines of telegraph, "over and along any of the military or post-roads of the United States, which have been, or may hereafter be, declared such by act of Congress."

Here was the inducement; *here* was the bait held out by Congress; *here* was the temptation offered to private capital and private enterprise. *It was the one right granted of intrinsic and practical value.*

By virtue of this authority, the telegraph company would have the right to construct, maintain and operate its lines over and along the roadways of a State, regardless of hostile State legislation, or exclusive grants made by the State to other companies; over and along the streets and alleys of

every municipality without negotiating with the aldermen thereof, except as to the terms of police regulation; over and along bridges, plank roads, turnpikes and railroads—in short, over and along any and every highway, which, by act of Congress, had been at the time, or which might at any time thereafter be declared and established post-roads of the United States.

If the telegraph company could have *these* rights under the act of Congress, it would be worth while to accept the impositions of the act. Armed with this authority, a telegraph company would seemingly have the right to construct, maintain and operate its lines anywhere and everywhere in the United States, if it cared to do so. And that it was the purpose of Congress to confer just such a right would seem certain from the following colloquy, taken from the debates in Congress, between Senator Nye, of Oregon, who was opposed to the bill, and Senator Sherman, of Ohio, who was the special champion of the bill:

"MR. NYE (of Oregon): There has never been in the annals of our legislature so sweeping a corporation as this, to construct a line of telegraph everywhere, wherever they please and at every station they are to get lands. There never was, in my judgment, such a corporation as this formed. If gentlemen are afraid of a monopoly, let them look at the title of this bill. I wish to make this inquiry of the Senator: *If this bill passes, will it authorize the National Telegraph Company to construct telegraphs in the United States wherever they have a mind to do so?*

"MR. SHERMAN (of Ohio): *Let me ask the honorable Senator, where is the objection to allowing telegraph companies to extend their telegraph lines anywhere in the United States?* WOULD YOU NOT LIKE TO HAVE

THEM EXTENDED TO EVERY MAN'S HOMESTEAD IF IT COULD BE DONE? WHY NOT? Then my friend must remember another thing, the National Telegraph Company is stricken out of the bill, and any company—he himself—may embark in the business.

"MR. NYE: Then, of course, this bill, if it passes at all, will consist simply of a single section, saying that any telegraph company existing, or that may hereafter exist, *may run a telegraph in the territory of the United States anywhere and get this land?*

"MR. SHERMAN: *That is the general privilege. Any telegraph company organized in a State may run the wires anywhere along the post-routes. They may take them to every man's door, if they choose, if it will pay*" (see Congressional Globe, Part IV., First Session, 39th Congress, pages 3480-3490).

As early as the year 1838 Congress had declared every railroad in the United States to be a post *route*. In the year 1853 it declared every railroad in the United States to be a post-*road*. Again in the year 1872, in a comprehensive act entitled "An Act to revise, consolidate, and amend the statutes relating to the Post Office Department," it was declared, "That all railways and parts of railways, which are now or may hereafter be put in operation, are hereby declared to be post-roads."

In the Act, July 24, 1866, Congress made an offer to the Western Union Telegraph Company that if it would submit to certain conditions and exactions, the Government of the United States would grant it the right to build its lines of telegraph over and along all the post-roads of the United States which were at the time, or that might at any time thereafter be declared such. The offer was accepted by the Western Union Telegraph Company in the year 1867. *Under the authority of this act it has, from the year 1867 to the present time, constructed its*

lines of telegraph along and over the roadways of every State, along and over the streets and alleys of nearly every city, and over, under and across nearly every navigable stream in the United States. Its right to do these things has never once been challenged since the decision in the Pensacola Case (96 U. S., 1). To be sure, it has in several instances been required, in thickly populated cities, to place its wires in conduits under ground. The right to constrain its action in this regard could, perhaps, be justified, on two grounds: (1) The police powers of a city, whereby every city is charged with the regulation of its streets; and (2) because the congestion of traffic of particular streets actually interfered with the ordinary travel on such streets, whereas the measure of petitioner's rights under the Act of Congress depends on its non-interference with ordinary travel.

Be pleased to note especially this limitation of petitioner's right under the Act of 1866. Petitioner claims no unqualified right to be or remain upon the post-roads of the United States. It admits—it is bound to admit—that its use of the post-roads is subsidiary to a primary use. It follows, from the very terms of its grant, that if to construct a telegraph line on a post-road would constitute an interference with the ordinary travel on that road, then the right to construct does not exist. Or if, having constructed its lines of telegraph upon a post-road, the subsequent maintenance of such lines, owing either to its own development or the development of traffic, should *grow* to be an interference, then its right to *remain* in its original location would *ipso facto* cease; and if it could not adapt itself, without interference, to the changed condi-

tions it must, under the very terms of its grant, cease to occupy the particular post-road.

Now, the words of the grant under which petitioner has claimed and exercised the right to occupy with its lines of telegraph the roadways of a state and the streets and alleys of a city, *give it an equal right to construct, maintain and operate its lines over and along the railroads of the United States.* Is there any reason in law why, from the grant of a right of user of all and all manner of post-roads, there should be excepted any particular class of post-road? If Congress has power over the highways of a State and the streets of a city to declare and establish them post-roads of the United States, must it stop short when it comes to a highway of a State called a railroad, operated by an agency created by the State?

As said by Mr. Justice BREWER in the Debs Case (158 U. S., 581):

"If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?"

If it is unwise or inexpedient to have constructed on the outer edges of a railroad right of way a line of telegraph poles and wires, then facts might be presented justifying a repeal of the Act of Congress or a modification of its provisions. Such argument, however, must be addressed to the Legislature, and not to the courts. Or, if the fact is that to construct or maintain a particular telegraph line on a particular railroad right-of-way would interfere with the ordinary travel on such post road, then, just as in the case of city streets, the right so

to construct and maintain would not exist. This fact, however, would be no reason to change the law, because Congress had the prescience in 1866 to forfend against such a contingency. In other words, *the question of interference with the ordinary traffic upon any particular post-road is always a question of fact, to be determined in the particular case.*

It may seem extraordinary that the Western Union Telegraph Company has never before invoked its rights under the Act of Congress to remain upon a railroad right-of-way, but any significance attaching to this fact is dispelled by the simple statement that never before the St. Paul M. & M. Case (118 Fed., 497) has it had occasion to do so. There is scarcely a railroad in the United States over and along which the lines of the Western Union Telegraph Company are not maintained and operated, and have been so maintained and operated since the invention of the railroad and the telegraph. Along the very railroads involved in this case the Western Union Telegraph Company and its predecessors in title and estate have maintained and operated lines of telegraph for more than half a century.

But heretofore this joint user has been by virtue of contracts between the telegraph and railroad companies, under the terms of which the telegraph company has not only constructed, maintained and operated its lines of telegraph along and over the railroad right of way, but has been permitted to establish its telegraph offices in railroad stations. This historical truth is important for several reasons:

First. It proves conclusively that there is no reason peculiar to railroads why this species of high-

way and post-road should not be occupied by telegraph lines as well as any other highway and post-road.

Second. It justifies the Act of Congress, July 24, 1866, because Congress did not create a new and artificial relationship between the railroad and telegraph, but simply recognized a relationship which these agencies themselves had created.

THIRD. Under particular contracts, railroad companies had bound themselves to give to the telegraph company an exclusive right over and along the railroad right of way, and such contracts prior to 1866 had been upheld (see *West. Un. Tel. Co. vs. Atlantic & Pacific Tel. Co.*, 7 Biss., 367). And, indeed, unless the Act of July 24, 1866, relates to the railroads of the country, as well as to other highways which have been declared post-roads, there is no reason in law why such an exclusive right should not be created by contract.

Express cases, 117 U. S., 1.
Chicago R. R. vs. Pullman Co., 139 U. S., 80.

But as early as 1879 Justice HARLAN, sitting in Circuit, declared in *Western Un. Tel. Co. vs. Amer. Un. Tel. Co.* (9 Biss., 72) that:

"Since the act of Congress of July 24, 1866, a railroad cannot grant to a telegraph company the sole right to construct a line over its right of way so as to exclude other telegraph companies which have accepted the provisions of said act of Congress, and whose lines would not disturb or materially obstruct the lines of the company to which the use has first been granted."

Afterwards, in 1884, Judge WALLACE, in the case of *West. Un. Tel. Co. vs. B. & O. Tel. Co.* (19 Fed. Rep., 660) declared

"A railroad is, under the statutes of the United States, a post-road, and accordingly *the act of Congress of July 24, 1866*, giving to all telegraph companies alike the right to construct, maintain and operate lines along all post-roads, *is paramount over any agreement made by a railroad company securing to a telegraph company the sole use of its line of road for its wires.*"

In 1895 the Supreme Court of the United States in *United States vs. Union Pac. Ry. Co.* (160 U. S., 1) declared:

"*Since the passage of the act of July 24, 1866, no railroad company, operating a post-road of the United States over which interstate commerce is carried on, can bind itself by agreement to exclude from its roadway any telegraph company incorporated under the laws of a State that has accepted the provisions of that act and desires to use such roadway for its line in such manner as will not interfere with the ordinary travel thereon.*"

The language of these decisions seems to us to imply the absolute right of a telegraph company accepting the obligation of the Act of 1866 to construct, maintain and operate it lines of telegraph over the railroads of the United States, not only without the consent of the railroad company, but in the very teeth of a contract that it will not assent; otherwise, how could such a contract be declared illegal and void? Clearly, if the Act of 1866 has the effect of invalidating a contract otherwise legal, giving a telegraph company the exclusive uses of a railroad right of way, it must have powerfully modified the asserted control of all railroad companies over their rights of way. But

be this as it may, the act of Congress, and numerous decisions to the same effect as those last quoted, establish beyond cavil the proposition that *it is the policy of the law that a railroad right of way should be utilized for the construction, maintenance and operation of telegraph lines so long as such lines shall not interfere with the ordinary operations of the railroad.* And yet the trial Judge in his opinion (Rec., p.) says:

"A railroad's right of way is the artery of its life; * * * it was well said by Judge McKENNEN in a case in this court, later referred to, 'every reasonable intendment must be made in favor of the primary rights of the complainant (in that case a railroad seeking to prevent part of its right of way being re-appropriated) * * * No actual encroachment upon these rights can be sanctioned or allowed; and in measuring their extent there must be a liberal consideration of the future as well as the present necessities of the complainant, touching the use of the existing TRACKS, the construction of additional ones, the convenient storage of its freight at all seasons and the unembarrassed transaction of its freight business.'"

It would seem from this language of the Trial Judge, and other language to like effect, that he would challenge the policy created by the Act of 1866, and announced by the Supreme Court of the United States, and that, in his opinion, a railroad right of way should be exempt from appropriation by a telegraph company. But is not the position of the Trial Judge weakened rather than strengthened by his allusion to the fact (Opinion, Rec., p.) that

"The Pennsylvania Railroad Company, prior to the beginning of this proceeding, *entered into a*

contract with the Postal Telegraph-Cable Company, dated June 25, 1902, whereby the railroad in substance agreed, in consideration of certain rentals to furnish that company with pole facilities upon its right of way for fifteen years, and permit the telegraph company to use the same for its wire?"

Is this not saying, in effect, that, while a railroad right of way is too sacred to be expropriated by a telegraph company, the railroad company may barter it, lease it, and appropriate it to this use upon terms agreeable to itself? It seems to us that, in the face of the declared policy of the Federal Government, as indicated in the Act of July 24, 1866, and the decisions of the Supreme Court of the United States relating to that act, this position of the Trial Judge is wholly untenable.

And he is equally mistaken in defining the *property* which the petitioner in error is here seeking to appropriate to its use. In his opinion (Record, p.) he says:

"What is here sought to be appropriated is the *ownership of, and title to, a part of the ground* constituting the general right of way of the railroad company."

Arguing from the false premise, he subsequently declares (Record, p.):

"If the railroad's future needs should demand the occupation hereafter of the whole of its present right of way for additional tracks, or if its own telegraphic necessities required it to duplicate on the north side the private telegraph lines it now has on the south side of its right of way, it is evident that it could not exclude from such the north side, or at all events from its right of way generally, a telegraph company that had condemned and acquired what is here sought."

In our Brief of Points we have answered this objection succinctly. Indeed, the answer is obvious. The Act of Congress (July 24, 1866) does not give, or affect to give, to any telegraph company accepting its provisions the right to condemn permanently to its use any portion of the *ground* constituting the highway or the post-road. It simply creates an easement within an easement—a right of way within a right of way—not permanent, but contingent upon the necessity of user for a primary purpose. *The petition in this case seeks only to establish the right granted.* It says so in so many words. The resolution of petitioner's Board of Directors says so. Furthermore, in order that its right of property may be specifically defined, it proposes that the judgment of the Court shall make its right of user subservient at all times to the paramount rights of the railroad company. This is by no means an unusual course of procedure (see authorities cited, Brief of Points, IX, Par. 6).

We deem it unnecessary to argue at length the proposition that Congress has jurisdiction over every foot of American soil within constitutional limitations. The Federal Constitution says that Congress shall have power to establish post-offices and post-roads. By this short sentence there was created a stupendous power. Under it has been evolved the entire postal system of the United States, comprehending not only the postal equipment, but a mass of law governing the use of the mails and postal facilities. When Congress declares that it shall be a crime for a person to deposit in, or take out of, post-offices a letter in furtherance of a scheme to defraud, it derives its authority for such an enactment from this short sentence in the Constitution. The letter it-

self may be perfectly innocent on its face—an ordinary business communication—the mere acknowledgment of money—and yet the Federal authorities look beyond the letter to the intent with which it was deposited in, or removed from, the post-office, and punish the intent of the writer or the receiver. The validity of this law has been upheld, because, if Congress has power to establish post-offices and post-roads, it must have as an incident to the power, the right to protect the mails from abuse and from becoming the instrumentalities of fraud.

So, under the power to establish post-roads, there is necessarily implied the right to regulate and prescribe the uses of such roads, and within this right Congress may act free from interference of State sovereignty or any agency created by the State.

More and more the people of the United States are coming to appreciate the words of Chief-Justice MARSHALL, in *Gibbons vs. Ogden*, 9 Wheaton, 1, where he says:

"The wisdom and the discretion of Congress, *their identity with the people*, and the influence which their constituents possess at elections are, in this, as in many other instances, as that, for example, of declaring war, *the sole restraints on which they have relied* TO SECURE THEM FROM ITS ABUSE. *They are the restraints on which the people must often rely solely in all representative governments.*"

That Congress has paramount jurisdiction over the *natural* highways of the country, such as navigable streams, has been conceded from earliest times. That its jurisdiction over the roadways of a State and the streets of a city for postal and military purposes is equally plenary, has likewise been established by numerous authorities. Does its ju-

risdiction stop short at *artificial* highways called railroads?

In *California vs. Pacific R. Co.* (127 U. S., 1), speaking for a unanimous Court, Justice BRADLEY says (p. 39):

"It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, *and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land.* But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject."

In *Re Debs* (158 U. S., 564), Justice BREWER, speaking on behalf of a unanimous Court, says (p. 586):

"The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. *It is*

charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from highways under its control."

Pause for a moment to consider the significance of this language. If resort may be had to the Federal courts to remove an obstruction on a railroad, *on the grounds that it is a public highway within the control of Congress*, should not Congress have some discretion in determining what constitutes an obstruction? Can a railroad company, operating such a highway, appeal to the courts to remove the poles and wires of a telegraph company on the grounds that they constitute an obstruction? Possibly it could have done so prior to the passage of the Act of July 24, 1866, and possibly it could do so since the passage of that act upon showing that the maintenance of the telegraph constitutes an actual interference with the ordinary traffic of such highway; but it is a familiar doctrine that a structure which the Legislature *authorizes* to be made upon a highway is a lawful structure, and cannot be removed as a nuisance or an obstruction.

Further in his opinion Justice BREWER also says (p. 589):

"It is said that the jurisdiction heretofore exercised by the national government over highways has been in respect to waterways—the natural highways of the country—and not over *artificial* highways, such as railroads; but the occasion for the exercise by Congress of its jurisdiction over the latter is of recent date. * * * Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in

the courts have been principally concerned therewith. The fact that in recent years interstate commerce has come mainly to be carried on by railroads and over artificial highways *has in no manner narrowed the scope of the Constitutional provision, or abridge the power of Congress over such commerce. On the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.*

"*Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation.* * * * The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

And again he says (p. 599):

"Summing up our conclusions, we hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is committed power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of Congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that while it may be competent for the government, through the executive branch and in the use of the entire executive power of the nation, to remove forcibly all such obstructions, it is equally within its com-

petency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of those courts to remove or restrain such objections."

In *Cherokee Nation vs. Southern Kansas Railway Co.* (135 U. S., 641), Justice HARLAN, speaking for a unanimous Court, says (p. 657):

"The question is no longer an open one, as to whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, *and, therefore, subject to Government control and regulation.* It is because it *is* a public highway, and subject to such control, that the corporation by which it is constructed, and by which it is to be maintained, may be permitted, under legislative sanction, to appropriate private property for the purposes of right of way, upon making just compensation to the owner, in the mode prescribed by law."

In *Monongahela Nav. Co. vs. United States* (148 U. S., 312) Justice BREWER, on behalf of a unanimous Court, says (p. 342):

"But the power of Congress is not determined by the character of the highway. *Nowhere in the Constitution is there given power in terms over highways, unless it be in that clause to establish post-offices and post-roads.* The power which Congress possesses in respect to this taking of property springs from the grant of power to regulate commerce; *and the regulation of commerce implies as much control, as far-reaching power, over an artificial as over a natural highway.* They are simply the means and instrumentalities of commerce, and the power of Congress to regulate commerce carries with it power over all the means and instrumentalities by which commerce is carried on. *There may be differences in the modes and manner*

of using these different highways, but such differences do not affect or limit that supreme power of Congress to regulate commerce, and in such regulation to control its means and instrumentalities. We are so much accustomed to see artificial highways, such as common roads, turnpike roads and railroads, constructed under the authority of the *States*, and the improvement of natural highways carried on by the general government, that at the first it might seem that there was some inherent difference in the power of the national government over them. *But the grant of power is the same. There are not two clauses of the Constitution, each severally applicable to a different kind of highway.* The fee of the soil in neither case is in the general government, but in the State or private individuals. *The differences between the two are in the origin—nature provides the one, man establishes the other.*"

More recently, in *Wisconsin, Minn. & Pac. R. R. Co. vs. Jacobson* (179 U. S., 287), Justice PECKHAM, rendering the opinion of the court, says (p. 296):

"Railroads have from the very outset been regarded as public highways, and the right and the duty of the government to regulate in a reasonable and proper manner the conduct and business of railroad corporations *have been founded upon that fact.* Constituting public highways of a most important character, the function of proper regulation by the government springs from the fact that *in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propositions.*

"It is *because* they are such highways *that the land upon which the rails are laid*, and also that which may be necessary for the other purposes of the corporation, *is said to be used for a public purpose*, and on that ground the power of eminent domain which is given them is held to be a constitutional exercise of legislative authority. The right

of the Legislature to tax in furtherance of such use is founded upon the same consideration that the use is a public one, and therefore taxation in support of such use is valid."

Summarizing at this point:

FIRST. We have established, after years of debate and hesitation, the indubitable and paramount authority of the United States over every foot of soil within its territory and within constitutional limits.

SECOND. Among the powers of Congress, now conceded and forever set at rest, is the right to use the highways of a State, natural and artificial, for military and postal purposes.

THIRD. We have the adoption by Congress of the Western Union Telegraph Company as a part of its postal and military machinery.

FOURTH. We have the grant from the United States to the Western Union Company of a qualified right to go over and along all the military and post-roads of the United States, including the railroads of the Pennsylvania Railroad Company.

FIFTH. We have the conceded fact that the user by a telegraph company of a railroad right of way without interference with the operations of the railroad is not only a reasonable user, but that every railroad right of way in the United States is, and has been since the invention of the railroad and telegraph, so used.

Is this grant by Congress to the petitioner in error a valid and constitutional grant? If not, why not? What element is lacking to its validity? It will be observed, of course, that the act does not, in express words, grant to the telegraph company

the power of eminent domain to appropriate private property generally. *The act itself* appropriates quasi-public property *specifically designated.* Nor is there any special machinery created by the act for the enforcement of its provisions. While the act does not require the telegraph company to pay to the railroad company any compensation for the use granted, it is equally true that there is no express declaration that compensation shall *not* be paid. So far as the act is concerned, the question of compensation remains open. If the Act of July 24, 1866, had declared in so many words that the right of user of the post-roads of the United States, including the defendant's railroads, was granted to the Western Union Telegraph Company free from any obligation to compensate the railroad company for such user, what then? Would the act be unconstitutional?

It is not every public use of private property that constitutes a "taking" of private property within the meaning of the constitution. Nor should it be forgotten that a railroad right of way is not "private" property. On the contrary, it is essentially public property. No railroad company has an absolute fee simple title to its right of way. It has, itself, only a right of user, with a reversionary intererest in the abutting owners. Such usually is the only right acquired by it under condemnation proceedings. But if a railroad company should purchase outright the land for its right of way, it would have no authority to sell the land again in the market, nor rent it for any purpose disassociated from the railroad unless specially authorized by statute.

In the case of *Pittsburgh & W. E. Pass. Railroad Co. vs. Point Bridge Co.* (165 Pa. St., 37; s. c., 30

Atlantic Rep., 511), the facts were that the Point Bridge Company was incorporated under Pennsylvania Statutes for the purpose of constructing a toll bridge and approaches thereto for public travel and accommodation across the Monongahela river. The Pittsburgh and West End Passenger Railway Company was incorporated two years later, and was proceeding to construct its line of railroad when it incidentally discovered that the tracks upon the bridge erected by the Point Bridge Company were adapted to the passage of horse cars, and thereupon used these tracks, running its horse cars over the bridge and paying the usual tolls to the bridge company for a number of years, when it concluded to equip and operate its road electrically. To this the bridge company objected, and denied it the right to cross the bridge. The railway company filed its bill in equity to restrain the Point Bridge Company from preventing the operation of an electric street railway over the toll bridge. In determining the controversy, the Supreme Court of Pennsylvania, by McCULLUM, J., first declared that the bridge of the defendant company was a public highway in its very nature, and as such every one who was entitled to use the public highway in a particular manner had the right to use the bridge in that manner, and that the sole right of the bridge company was the right to charge tolls for such use. The railway company had accepted the provisions of the Passenger Railway Act of May 14, 1889, and the Court held that by this acceptance the company became entitled to all the privileges, franchises and powers conferred by that act. The act authorized the formation of companies "for the purpose of constructing, maintaining and operating a street railway upon any street or highway for public use in the

conveyance of passengers by any power other than locomotive, and the Court says:

"Do the words 'any street or highway,' as used in this act, exclude bridges? We have already seen that a bridge erected for public travel and accommodation is a public highway, whether built and maintained by the inhabitants of the district, or by a corporation authorized to demand tolls for passage over it. * * * When the Pittsburgh & West End Passenger Railway Company accepted the provisions of the act, and acquired new letters patent, it was, and for ten years previous thereto had been, operating its railway by horse power on the route already described. The Point Bridge Company made no objection to the passage over its bridge of the cars of the railway company. The tolls were adjusted by an arrangement between the companies which was satisfactory to both. This arrangement continued until the railway company proposed to operate its road by electricity. It was the proposed change in the method of operating it that led to this litigation, in which the bridge company contends that the railway company has no right to use the bridge in moving its cars over its established route. The consent of the local authorities has been duly given to the latter to operate its railway on that route, and in the manner proposed. *It has all the powers, franchises and privileges granted by the Act of 1889 to street passenger railway companies.* * * * *The use of the bridge in the manner proposed does not constitute a taking of or any injury to the property of the bridge company, in the exercise of the power of eminent domain. It is a use which is reasonably consistent with the purpose for which the bridge was erected, and is necessary for public travel and accommodation.* We conclude, therefore, that under the legislation and with the municipal consent to which we have referred, the railway company has the right to operate its line across Point Bridge 'by any power other than by locomotive,' in such manner and on such terms as

will protect the rights of the bridge company and the traveling public. The learned court below, after a careful inquiry into the facts and circumstances affecting the issue raised by the bill and answer, entered a decree which appears to be reasonable and just. *It is a decree which carefully guards the rights of the bridge company, which properly regulates the use of the bridge by the railway company, and exacts from the latter the payment to the former of a toll rate, the adequacy of which is not questioned.*

"We have not overlooked the contention which denies to a court of equity jurisdiction of the matter complained of, but we cannot assent to it. On the contrary, we think the railway company applied to the proper tribunal for the relief sought."

This case, in principle, is on all fours with the case at bar, even to the judicial determination of the amount of tolls to be charged and the judgment regulating the relationship of the parties in the use of the public highway (see, also, cases cited under Point IV and Point X, in brief).

It will be seen from these cases that the ultimate authority as to what use of property constitutes a "taking" is the judiciary; but unfortunately the acts which one Judge would decree to be an appropriate use of property not constituting a taking, would, by another Judge be decreed to be a taking within the meaning of the Constitution. Various cases have held that the appropriation of a railroad right of way to the uses of a telegraph company, limited to non-interference with travel and railroad operations, was a *technical* "taking," but that the railroad company was entitled only to *nominal* damages, thus preserving an alleged abstract technical right under the Constitution, while actually

deciding that no right had been infracted and no injury inflicted. See, for instance,

Mobile & O. R. R. Co. vs. Postal Tel. Co., 41 *L. R. A.*, 403.

Mobile & O.R. R. Co. vs. Postal Tel. Co., 26 *So. Rep.*, 370.

Postal Tel. Co. vs. Or. Sht. L. R. R. Co., 65 *Pac.*, 735.

Postal Tel. Co. vs. Or. Sht. L. R. R. Co., 114 *Fed.*, 787-792.

Postal Tel. Co. vs. Or. Sht. L. R. R. Co., 104 *Fed.*, 623.

St. L. & C. R. R. Co. vs. Postal Tel. Co., 173 *Ill.*, 508.

Union Pac. R. R. Co. vs. Postal Tel. Co., 69 *Pac. Rep.*, 564.

Kansas & A. V. R. R. Co. vs. Payne, 46 *Fed.* 546, *reversed by Court of Appeals*, 49 *Fed.*, 114.

But even conceding that, in enforcing its rights under the grant from Congress, the petitioner in error would somehow, and to some extent, appropriate some possible private interests of the defendant railroad company in its right of way, would the grant, therefore, be void? Or would the petitioner be entitled to make its appropriation upon the payment of just compensation—the amount to be determined in a Court of Justice?

There are several cases, more or less antiquated, found in State reports to the effect that, where the Legislature has in express terms granted a right to appropriate private property, but has not specifically declared that just compensation must be paid therefor, nor invented special machinery for the exercise of the power of eminent domain, the omission

constitutes conclusive evidence that the Legislature shall be taken to mean, *not what it says*, but simply that the beneficiary under the act may acquire property *if he can do so with the consent of the owner*. We respectfully protest that such a doctrine of interpretation finds no sanction in any law of hermeneutics, and is against common reason and common sense; particularly so as applied to the acts of Congress. For, as said by Justice HARLAN in *Cherokee Nation vs. Southern Kansas R. R. Co.* (135 U. S., 641-657).

"It is not necessary that an act of Congress should express in words the purpose for which it was passed. The Court will determine for itself whether the means employed by Congress have any relation to the powers granted by the Constitution."

On general principles, why should the constitutional provision that property shall not be taken without just compensation, be copied into every legislative act providing for the appropriation of property, when, as a matter of law, every constitutional limitation is made part of the legislative act by implication and intendment? *If the beneficiary under the act must comply with the terms of the act, must he not also comply with the terms of the Constitution? The Legislature presumably intends that its act shall be effective according to its plain import. If thus to give the act its due effect it is necessary that the grantee also comply with some provision of the Constitution, then why not comply with the Constitution? Is not the Constitution, ex necessitate, a part of the act?* And it must be particularly noted that the clause of the Constitution relating to eminent domain is negative in its state-

ment. It says that private property *shall not be taken* for public use *without just compensation.*

Said Mr. Justice STRONG, in *Kohl vs. United States* (91 U. S., 367-372):

"The Fifth Amendment contains a provision that private property shall *not* be taken for public use without just compensation. What is that but an implied assertion that, on making just compensation, it *may* be taken?"

THIS CLAUSE OF THE CONSTITUTION, BEING NEGATIVE, IS SELF-ENFORCING.

Thus in *Hickman vs. City of Kansas* (120 Mo., 110; S. C., 41 Am. St. Rep., 684), it is said:

"It is also well-settled law that this article of the Constitution gives an absolute right and is self-enforcing, and although the Legislature may have enacted no law providing a mode for the ascertainment and payment of the compensation provided for, resort may be had by the party entitled to the right to any common-law action which will afford him adequate and appropriate means of redress." And further: "The rule is, that if a statute gives a remedy in the affirmative, without containing any express or implied negative, for a matter which was actionable at common law, this does not take away the common-law remedy, but the party may still sue at common law, as well as upon the statute. In such cases the statute remedy will be regarded as merely cumulative."

In *Re Rugheimer* (36 Fed., 369), SIMONTON, J., says:

"The objection is that nothing is said in this act about compensation to the owner of the land sought to be condemned, and that in this the act is in conflict with the Fifth Amendment, which declares, 'Nor shall private property be taken for public use without just compensation.' If the *right* to con-

demn private property for a public purpose rested on this act of Congress (*i. e.*, was *created* by it), there would be great force in this objection. *But the right of eminent domain does not rest on a statute or on a constitutional enactment* (citing *Boom Co. v. Patterson*, 98 U. S., 406). *It is an attribute of sovereignty, possessed by the general government as sovereign, to enable it to perform its proper functions. It is an authority essential to its independent existence and perpetuity.* * * * This right of eminent domain, being thus possessed by the United States, the *mode* of exercising it, in the absence of any express provision in the Constitution to the contrary, is within the discretion of the Legislature. Without doubt Congress, representing as it does, in the House of Representatives the sovereignty of the people, and in the Senate the sovereignty of the States, can, whenever it deems necessary, *order* private property to be appropriated for a public use. *Such order would be subject to the constitutional limitation, and would require that compensation should be made for such appropriation.*"

Nor would the failure to provide special machinery for ascertaining the amount of just compensation be a material omission. Indeed, in the earlier days of the Republic, the special commissions and tribunals created by statute for estimating damages in condemnation proceedings were attacked as unconstitutional, *the contention being that the defendant was entitled to a jury trial according to the common law.* But in theory of law, the determination of the question in any court of justice, and by whatever means, is conclusively presumed to be just. Nor in theory could there be any difference in the amount, whether the trial be had before a special commission or a jury duly impanelled.

At common law the ascertainment of damages was always by a jury summoned under the writ *ad quod damnum*. Concerning this writ Mr. Lewis, in his work on Eminent Domain, Vol. 2, Section 402, says:

"The writ of ad quod damnum.—*This is a common-law writ, and has been a favorite mode of procedure in this country,* especially in highway and mill cases. The writ should contain definite directions as to what the jury are to consider, and should conform to any statutory provision which may be applicable. Either the order or the writ should specify the time and place of the meeting of the jury. Though directed to the sheriff, it may be executed by his deputy. The return may be amended even after the sheriff has gone out of office" (see, also, Cases cited in Brief, Point XII., p. 6).

In *Kohl vs. United States, supra,* the act authorizing condemnation provided no machinery, and the trial was had before a jury according to the common-law method.

See, also,

United States vs. Jones, 109 U. S., 513.
High Bridge Co. vs. United States, 69 Fed., 320.
Dashiell vs. Grosvenor, 66 *id.*, 338.
McElroy vs. Kansas City, 21 Fed., 257, per BREWER, J.

The first syllabus in this case reads as follows:

"The damage to property, by the Constitution of Missouri, is placed upon the same basis as the value of the property taken, and neither can be done without compensation first made. *This Constitutional guaranty needs no legislative support, and is beyond legislative control.*"

In his opinion the learned Judge says (p. 259):

"Complainant insists that this provision of the Constitution is imperative; that it does not depend for its force upon the Legislature; that it cannot be defeated by the want of action on the part of the Legislature; and that the courts are bound absolutely to enforce its mandates, and restrain any public action which either takes or damages private property until the value of the property taken, or the amount of damage done to property not taken, has been ascertained and paid. It is obvious that this question is of momentous importance, for as no provision has been made for ascertaining the damages to property not taken, the only way that this can now be ascertained is by personal agreement, which, if the claim of complainant is wholly sustained, would place every public improvement at the mercy of any party whose property is injured thereby. * * * The question is, can the imperative mandates of the Constitution be practically defeated by the want of action on the part of the Legislature? * * * The Constitution is the final law, measuring all private and public rights, whose commands Legislatures and courts must respect; whose mandates, when imperative, must be enforced, regardless of all consequences. * * * I know that there are many provisions of the Constitution which are not self-executing—which are, so to speak, dormant until the Legislature acts; as where *rights* are given, *to be exercised in a way provided by the Legislature.* * * * I hold, therefore, that the rule of the Constitution is the same in respect to property damaged as to property taken, and that such Constitutional guaranty needs no legislative support, and is beyond legislative destruction. * * *

"When the defendant has an ultimate right to do the act sought to be restrained, *but only upon some condition precedent*, and compliance with the condition is within the power of the defendant, injunction will almost universally be granted until the condition is complied with. This principle lies

at the foundation of the multitude of cases which have restrained the taking of property until after the payment of compensation, for in all of those cases the Legislature has placed at the command of the defendant means for ascertaining the value of the property. * * *

"Where the defendant has an ultimate right to do the act sought to be enjoined upon certain conditions, and the means of complying with such conditions are not at his command, the courts will endeavor to adjust their orders as on the one hand as to give to the complainant the substantial benefit of such conditions, while not restraining the defendant from the exercise of its ultimate rights. *Thus, in the case at bar, the defendant has, of course, the ultimate right to grade this street. As a condition of such right is a payment of damages, but it has no means of ascertaining those damages; no tribunal has been created, no provision of law made, for their ascertainment. Hence, if possible, the court should provide for securing to the defendant this ultimate right, and at the same time give to the complainant the substantial benefit of the prior conditions.* * * *

"The order, therefore, will be that upon the giving of a bond in the sum of $3,000, and the filing of a stipulation to accept such damages as shall be ascertained in the manner hereinafter provided in full satisfaction of all claims against the defendant, the defendant will be restrained from grading said street; provided, that at any time the defendant may, upon 20 days' notice, apply to either of the judges of this court for the appointment of a board of commissioners of three freeholders to ascertain and report the amount of damages which complainant will sustain by reason of the grading of said street, and upon the payment of the damages so reported by such commissioners the injunction will be vacated. The report of a majority of the commissioners will be the report of the board, and either party may appeal to the judge appointing such commissioners for a review of their report."

Compare this decree with that of Judge THAYER in *St. Paul M. & M. Ry. Co. vs. W. U. Tel. Co.*, 118 Fed., 497.

In the case of *St. Louis vs. Western Union Telegraph Company* (148 U. S., 92), Justice BREWER, speaking on behalf of the majority of the court, held that the City of St. Louis had a right to charge the telegraph company a reasonable compensation for the use of the streets, and, in concluding his opinion, says (pp. 104-5):

"Indeed, it may be observed in the line of thought heretofore expressed that this charge is one in the nature of rental; *that the occupation by this interstate commerce company of the streets cannot be denied by the city;* that all that it can insist upon is, in this respect, *reasonable compensation for the space in the streets thus exclusively appropriated*, and it follows, in the nature of *things*, that it does not lie exclusively in its power to determine what is reasonable rental. *The inquiry must be open in the courts.*"

In these concluding remarks, the Supreme Court of the United States has given utterance to every principle for which we contend:

FIRST. That, having accepted the obligations of the Act of Congress, July 24, 1866, the Western Union Telegraph Company has the right to construct, maintain and operate its lines of telegraph over and along the post-roads of the United States, including the streets and highways of the City of St. Louis, and the railroads of the defendant railroad company.

SECOND. That its occupation of such post-roads cannot be denied by the owners of such post-roads, whether city or railroad.

THIRD. That all that such owner can insist upon is, in this respect, reasonable compensation for the space exclusively appropriated.

FOURTH. And that it follows in the nature of things that it does not lie exclusively in the power of such owner to determine what is reasonable compensation, but that the inquiry must be open in the courts.

The right claimed by the petitioner in error to occupy the railroads of the defendant in error is derived from the same grant of Congress as its right to occupy the streets and highways of the City of St. Louis. Its grant in both instances is in identical language. This language does not specify either the streets of a city or the roadways of a railway company, except under the general phrase "military and post-roads," which applies equally to both. If the streets of St. Louis are to be *included* in the grant, and the railroads of the defendant in error *excluded* from the grant, where does the court find its authority for including the one and excluding the other? That it applies equally to both has been determined in the following cases:

Postal Tel. Co. vs. Or. Sht. L. R. Co., 114 *Fed.*, 787.

Postal Tel. Co. vs. Or. Sht. L. R. Co., 65 *Pac. Rep.*, 735.

Postal Tel. Co. vs. Southern Railway Co., 89 *Fed.*, 190.

Cf., St. Paul, M. & M. Ry. Co. vs. W. U. Tel. Co., 118 *Fed.*, 497.

Counsel for defendant in error contend, however, that the Supreme Court of the United States has construed the Act of July 24, 1866, contrary to the principles and cases herein set forth.

Two cases only are relied upon in support of this contention: The PENSACOLA CASE, 96 U. S., 1; and the ANN ARBOR CASE, 178 U. S., 239. Neither of these cases is an authority in point, for the following reasons:

1. The right of a telegraph company accepting the obligations and restrictions of the Act of July 24, 1866, to appropriate private property, was not in issue in either case, and all that is said by the particular justice, voicing the decision of the court, as to the scope of the act beyond the points directly in issue, is clearly *obiter*.

2. If the meaning of such *obter dicta* is as contended for by counsel for respondent, then it is inconsistent with other statements made by the very Justices rendering these opinions, and diametrically opposed to the ruling of the Supreme Court of the United States in other cases.

3. The *dicta* in these two cases do not require, and only by forced construction admit of, the construction placed upon them by respondent's counsel:

This will appear upon an analysis.

The Pensacola Case.

The Legislature of Florida, on the 11th of December, 1866, passed an act incorporating the Pensacola Telegraph Company and granting it "the sole and exclusive privilege and right of establishing and maintaining lines of electric telegraph in the Counties of Escambia and Santa Rosa." On the 24th of June, 1874, the Pensacola and Louisville Railroad Company granted to the Western Union

Telegraph Company the right to erect a telegraph line upon its right of way which lay through the counties above named. The Western Union Telegraph Company was proceeding to build its lines along the railroad right of way when the Pensacola Telegraph Company sought to enjoin the work and use of the land on account of the alleged exclusive right of that company under its charter. The Western Union Telegraph Company defended under the Act of Congress, July 24, 1866.

Here was the sole issue. The question whether the Western Union Telegraph Company, by accepting the provisions of the act, was authorized to use the right of way over and along the railroad willy-nilly, the railroad company was not even remotely involved. Anything said concerning such a right, therefore, is not only *obiter*, but extra-judicial.

It should be remembered that this was the first case arising under this Act of Congress. The War of the Rebellion had been brought to a close only ten or twelve years previous. The war had settled many questions, to be sure, at that time only half realized, and the great body of law since evolved out of the interstate commerce clause of the Federal Constitution was totally undreamed of. This is apparent from the vehemence with which various questions were debated, as appears from the dissenting opinion in the Pensacola case, and the tentative, dubious statement of principles which to-day are legal commonplaces.

It was evidently in answer to some of the moot doctrines urged by the dissenting Justices in conference, and voiced by Mr. Justice FIELD in his dissenting opinion (doctrines subsequently wholly repudiated by Justice FIELD, who, about the time of

the Neagle case (135 U. S., 1), became a pretty good Federalist himself), that Chief Justice WAITE, voicing the majority opinion, uses the following language (p. 11):

"It (the Act) gives no foreign corporation the right *to enter upon private property* without the consent of the owner and erect the necessary structures for its business; but it does provide that whenever the consent of the owner is obtained, no State legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges."

And again (p. 12):

"*No question arises* as to the authority of Congress to provide for the appropriation of *private* property to the use of the telegraph, *for no such attempt has been made.* The use of *public* property alone is granted. If *private* property is required, it must so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with; only national privileges are granted."

This language of the Chief Justice, if it has the limited meaning attributed to it by counsel for respondent, is certainly inconsistent with the meaning suggested by his language in *Telegraph Company vs. Texas* (105 U. S., 460); for (on page 464) Chief Justice WAITE says:

"Congress, to facilitate the erection of telegraph lines, *has by statute* AUTHORIZED *the use of the public domain and the military and post-roads*, and the crossing of the navigable streams and waters of the United States for that purpose. As a return for this *privilege* those who avail themselves of it are bound to give the United States prece-

dence in the use of their lines for public business at rates to be fixed by the Postmaster-General. *Thus, as to government business, companies of this class become government agencies.*"

He had already, in the Pensacola case, used the following language in defining what were military and post-roads (96 U. S., 11):

"It is insisted, however, that the statute extends only to such military and post-roads *as are upon the public domain;* BUT THIS WE THINK IS NOT SO. * * * *There is nothing to indicate an intention of limiting the effect of the words employed; and they are, therefore, to be given their natural and ordinary signification.*"

In the third place, the language employed by the Chief Justice in the Texas case and in the Pensacola case, while obviously inconsistent if the contention of respondent's counsel is correct, is easy to be reconciled if fairly construed; for it is literally true, as stated by the Chief Justice, that Congress had *not* attempted to provide for the appropriation of *strictly private property* to the use of the telegraph. A railroad doing interstate business is not, as we have shown, a private corporation; its property is not private, for it is devoted to the service of the public, and the corporation is simply a trustee of such property, the usufruct belonging to the public.

In the language of Justice BRADLEY in Stockton vs. Baltimore & N. Y. Railroad Co., 32 Fed. Rep., 20:

"It matters little whether the United States has or has not the *theoretical* ownership and dominion. * * * *It has what is more, the regulation and control of them for the purposes of commerce.*"

It does not militate against the *dictum* of the Chief Justice to say that, if, to make available its

grant by Congress of the use *of particular public property*, it becomes necessary to make compensation *for private property incidentally taken*, the telegraph company shall be permitted to do so. Otherwise, what becomes of the grant? Would you nullify the grant itself in behalf of an incident to the grant?

It is somewhat remarkable that a recent text writer on Constitutional Legislation, in his interpretation of the Pensacola case, has gone as far in one direction as counsel for defendant have gone in the opposite direction to extract a meaning from the case which the language of the opinion and the facts actually involved by no means warrant.

Says Mr. Ordronaux, in his work on Constitutional Legislation (p. 557): "The act of July 24th, 1866, granting to telegraph companies authority to maintain and operate lines of telegraph over and along any of the military or post roads of the United States which have been or may hereafter be declared so by Act of Congress is plainly an exercise of suppletory power of the most far-reaching character. Whether Congress has the power to require a railroad corporation to permit telegraph companies to use its *road bed* under its power to regulate commerce and to establish post offices and post roads *has been decided affirmatively in the case of the Pensacola Telegraph Company v. The Western Union Telegraph Company.* This decision, which appears to rest mainly on grounds of public policy and broadens the powers of the general government to an unprecedented degree, recognizes the right of Congress to keep pace with the progress of the country and to adapt itself to the new developments of time and circumstances."

The author, MR. JOHN ORDRONAUX, LL.D., represents himself to be a Professor in the Law School of Columbia College. His reading of the Pensacola case was certainly most careless, and his deduction wholly unwarranted; for the Pensacola case no more decided that a railroad corporation could be required to permit telegraph companies to use its "road bed" than it decided to the contrary. The point was not in the case and could not, therefore, have been decided one way or the other. Nor has the precise point ever been determined by this court up to the present time; the nearest approach to a decision of the question here involved being the St. Louis case which, in our humble opinion, is identical in principle with the case at bar and which, by reading into the act of July 24th, 1866, the Fifth Amendment of the Federal Constitution, not only saves the act from assault on Constitutional grounds but demonstrates that the provisions of the act, subject to the Constitution, are most reasonable and beneficent.

The Ann Arbor Case.

In this case the Western Union Telegraph Company, a corporation of New York, filed its bill in the State Court of Michigan to restrain the Ann Arbor Railroad Company, a corporation of Michigan, from interfering with certain telegraph lines along the defendant's railroad. The principal contention of the telegraph company was that the provisions of a contract made with the Frankfort and Southeastern Railroad Company were binding on the Ann Arbor Company, which had purchased the property and franchises of the Frankfort and Southeastern Railroad Company at foreclosure sale.

The 6th paragraph of the bill read as follows:

"6th. Your orator is now and long has been doing an extensive telegraph business in many parts of the United States. On January 7, 1867, it filed with the Postmaster-General its acceptance of the provisions of the act of the United States passed July 24, 1866."

This was its only reference to the act in question. No rights were claimed by vrtue of the act nor the acceptance of its provisions. No rights under the Federal law of any description were claimed, suggested or hinted.

The case was removed *by the defendant railroad company,* upon the ground that the suit was one arising under the Constitution and laws of the United States, and especially under the Act of July 24, 1866, from the State to the Federal Courts, *no question of the right to remove being raised by the Telegraph Company, plaintiff.*

The telegraph company failed in its contention that a contract with one railroad company had been ratified and adopted by its successor through foreclosure proceedings, and appealed to the Supreme Court of the United States.

On its own motion, the Supreme Court raised the question of the jurisdiction of the Federal Courts, and remanded the case to the State Courts *on the ground that the complainant had not so framed its bill as to raise any question under the Act of July 24, 1866,* and, therefore, the case did not fall within the provisions of the removal acts.

Here, it will be observed, there was no issue raising the question whether or not the Act of July 24, 1866, gave to a telegraph company accepting its terms the right to use the railroad as a post road of the United States.

Mr. Chief-Justice FULLER, says (p. 243):

"The bill was in legal effect a bill for the specific performance of the contract set up in the pleadings, and the prayer was for injunction against interference with complainant's alleged rights."
* * *

"*It was not argued by counsel for the telegraph company that the telegraph company had any right under the statute, and independently of the contract, to maintain and operate this telegraph line over the railroad company's property.*"

At this point, it seems to us, the opinion should have concluded, for the court had affirmed that the bill was one for specific performance of a contract involving no Federal question; and that, while reference was casually made in the bill to complainant's acceptance of the provisions of the Act of Congress, no right was claimed under it. Therefore, there was no Federal question in the case.

But the learned Chief Justice adds:

"And it has been long settled that that statute (July 24, 1866), did not confer on telegraph companies the right to enter on private property without the consent of the owner and erect the necessary structures for their business."

He then quotes from the Pensacola case as follows:

"But it does provide that whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges."

Continuing, the opinion says:

"In that case Mr. Chief Justice WAITE further said: 'No question arises as to the authority of Congress to provide for the appropriation of pri-

vate property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized.'"

But Chief Justice FULLER does not conclude his opinion at this point, and his further language (p. 244) is of great significance:

"We are unable to perceive that Paragraphs Sixth and Seventh met this requirement, and it does not appear to us that they were intended to do so by the pleader. * * * But it was argued *that, by virtue of the statute*, the telegraph company was *possessed of a public character and was discharging public duties*, and that, although the interest it acquired by its contract was subject to the prior mortgage, it could not be absolutely deprived thereof by foreclosure, but that the Circuit Court should have so framed its decree as to preserve the occupancy of the telegraph company, *subject to making compensation to the railroad company, the value of the alleged easement to be ascertained by the court.* It is sufficient to say that the bill was not framed in that aspect, and, though there was a prayer for general relief, relief cannot be awarded under that prayer unless it is such relief as is agreeable to the case made by the bill. *And it is entirely clear that there were no averments in the bill in respect of this contention which would bring the case within the category of cases* arising under the Constitution or laws of the *United States so that jurisdiction could be held to have rested on that ground.*"

Why use this language if the contention of respondent's counsel is correct? How can it be reconciled with the language of the Chief Justice just preceding, if such language had the meaning at-

tributed to it? Does not the Chief Justice intimate, as plainly as words can convey ideas, that if in its bill the Western Union Telegraph Company *had* contended that by virtue of the statute passed July 24, 1866, the telegraph company was possessed of a public character and was discharging public duties, and had prayed for a decree to preserve the occupancy of the telegraph company subject to making compensation to the railroad company, to be ascertained by the court, *a Federal question would have been presented and duly passed upon?*

IN THE CASE AT BAR SUCH A CLAIM IS MADE, AND SUCH A PRAYER IS OFFERED; AND, FOR THE FIRST TIME SINCE THE PASSAGE OF THE ACT, THE ISSUE IS HERE SQUARELY PRESENTED TO THE SUPREME COURT OF THE UNITED STATES WHETHER AN INTERSTATE RAILROAD, DECLARED BY CONGRESS TO BE A POST-ROAD, IS AS MUCH WITHIN THE PURVIEW OF THE ACT OF CONGRESS, JULY 24, 1866, AS ANY OTHER PUBLIC HIGHWAY.

This argument, may it please the Court, has already lengthened beyond our expectations.

As to complainant's rights as lessee of the property and franchises of the Atlantic and Ohio Telegraph Company, our Brief of Points contains in outline the argument for our contention, and we respectfully submit the case on the statement therein made and the authorities therein cited.

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